PREAMBLE TO REVISED PART 51 AND Part 70

DRAFT

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DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 51 and 70
[FRL-]
Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: The EPA is today promulgating new streamlined procedures for revising stationary source operating permits issued by State and local permitting authorities under title V of the Clean Air Act (Act). These revisions to part 70 were proposed in two notices published in the Federal Register on August 29, 1994 and on August 31, 1995.

In addition, today's notice promulgates numerous other changes to part 70 that were proposed in those two notices. Among these are changes to: the definition of major source with respect to research and development activities, support facilities, and fugitive emissions; provisions related to operational flexibility under emissions caps; the certification of compliance that a responsible official of a permitted source is required to submit; and the affirmative defense available for violations of permit terms during an emergency. Today's notice also promulgates revised procedural requirements for "minor" new source review (NSR) permitting under title I of the Act to provide additional flexibility to States in providing public review for minor NSR actions.

DATES: The regulatory amendments announced herein take effect on [60 days from the date of publication], 1997.

ADDRESSES:

Docket: Supporting information used in developing the regulatory revisions to part 70 are contained in Docket No. A-93-50. This docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday. A reasonable fee may be charged for copying. The address of the EPA Air Docket is: room M-1500, Waterside Mall, 401 M Street SW,

Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Ray Vogel (919/541-3153, vogel.ray@epamail.epa.gov) or Roger Powell (919/541-5331, powell.roger@epamail.epa.gov), mail drop 12, United States Environmental Protection Agency, Office of Air Quality Planning and Standards, Information Transfer and Program Integration Division, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Today's proposal reflects the principles articulated in the President's and the Vice President's March 16, 1995 report, "Reinventing Environmental Regulation." That report establishes goals for partnerships between EPA and State and local agencies in development of environmental regulations. These goals are: minimizing costs, providing flexibility in implementing programs, tailoring solutions to the problem, and shifting responsibilities to State and local agencies. The Agency believes that the proposal in today's notice meets the goals of the report.

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I. Background

A. Operating Permits Regulations

Title V requires that EPA develop regulations which set minimum standards for State operating permits programs. Those regulations, codified in part 70 of chapter I of title 40 of the Code of Federal Regulations, were originally promulgated on July 21, 1992 (57 FR 32250). On August 29, 1994, EPA proposed a number of revisions to the part 70 regulations as a result of negotiations with litigants who petitioned for review of part 70 after its promulgation (59 FR 44460). The August 1994 proposal primarily included new procedures for revising permits. In response to comments on the 1994 proposal, on August 31, 1995, EPA proposed further revisions to part 70 including a proposal for a simpler permit revision approach designed to build upon existing State permitting programs (60 FR 45530).

Title V also requires that States submit their operating

permit programs for EPA approval and that EPA promulgate and administer a Federal operating permits program for States that have not obtained EPA approval of a program by November 15, 1995. On November 15, 1997, EPA began administering Federal operating permits programs in Indian country, except where a part 70 program was approved. The EPA's regulations for the Federal operating permits program are codified at part 71, which was promulgated on July 1, 1996 (61 FR 34202). In large part the part 71 regulations are modeled on the original part 70. The EPA will also promulgate in a future rulemaking action a phase II of the part 71 regulations, which will consist of regulatory changes that will make part 71 consistent with part 70 as revised by today's rulemaking.

B. Permit Revision System

The August 1994 notice proposed to revise § 70.7 to establish a four-track system for revising operating permits. Comments received at the October 19, 1994 public hearing and comments submitted to the docket indicate that the proposed four-track system was widely perceived as too complicated, prescriptive, and disruptive to existing State programs. In response to those concerns, EPA sought further input from representatives of State and local permitting agencies, industry, and environmental groups to learn more directly about their implementation concerns. The EPA received many thoughtful ideas from these groups about streamlining the process for permit revisions. After considering comments received on the August 1995 proposal, EPA is today promulgating final revisions to part 70 based largely on the August 1995 proposal for permit revisions.

C. Other Revisions in Today's Notice

Today's notice also promulgates additional part 70 revisions proposed in the August 1994 and August 1995 notices. In part, these revisions involve provisions in the current part 70 regarding certification by a responsible official, the affirmative defense for violations of permit terms during an

emergency, and the definition of title I modification. Today's notice also revises the public review requirements of title I applicable to minor NSR permits.

Finally, in today's notice EPA is clarifying that research and development (R&D) activities located with a major source under sections 112, 302(j), or part D of title I of the Act, need not be considered part of that major source or required to obtain a permit, unless the R&D activities together constitute a major source.

A number of revisions to the definitions in § 70.2 are included in today's notice to be consistent with the promulgated revisions.

D. Environmental Benefits

Implementation of today's action will help achieve the environmental benefits that Congress expected from an operating permits program. The revisions tailor public and EPA review to the environmental significance of the changes being made. This review should improve compliance with the Act and its implementing regulations by sources undertaking permit revisions with potentially substantial environmental consequences, such as those which avoid major source requirements by offsetting emissions increases at new or modified units with emissions decreases at existing units. At the same time, the streamlined permit revision system assures that most permit actions, which are much less likely to have a major environmental impact, are revised expeditiously to avoid unnecessary procedural delays and associated costs. Yet, the system will still assure in all cases that the source, the public, and governmental agencies are aware of all of a source's obligations under the Act and regulations promulgated thereunder, which will improve compliance.

E. Structure of Preamble

This notice sets forth the changes that have been made to part 70 as a result of the August 1994 and August 1995 proposal notices. Sections III. through IX. discuss changes to §§ 70.2 through 70.8 where the change is not being made as proposed due

to public comment, or where the change is being made as proposed and there was significant adverse public comment to the proposed change. Similarly, section X. discusses proposed revisions to 40 CFR part 51. For these changes, the preamble summarizes the proposal, summarizes the comments, discusses the proposal and comments, and explains the final change. Section II of this preamble lists, without discussion, the changes that are being made as proposed where there was no significant public comment. Responses to public comments are provided in greater detail in a response to comment document which is in the docket for today's action.

In this preamble, as in part 70, the word "State" includes any local, city, county, or tribal air pollution control agency, or any other entity, that is implementing an EPA approved part 70 operating permits program.

II. Summary of Changes For Which There Was Not Adverse Public Comment

A number of regulatory revisions to part 70 that were proposed in the August 1994 and August 1995 proposals were not the subject of substantive public comment and are being promulgated in today's action as proposed. These revisions are, therefore, not being discussed in this preamble. For clarity, however, these revisions are listed herein.

Definitions are added for "Major NSR" and "Minor NSR." The definitions of "Permit modification" is being deleted. The definition of "Applicable requirement" is being revised to include requirements limiting emissions for purposes of offsets and to specify that section 608 and 609 requirements of title VI are applicable requirements. The definition of "Administrator" is being revised to add "her." The definition of R&D activities is revised to clarify restrictions on separate major source treatment and to expand eligibility to more sources. The definition of "Responsible official" is revised to be consistent with the definition of designated official under the Acid Rain program.

Under the definition of "Major source," a clarification is added that for areas defined in paragraph (3) of the definition with lower major source cutoffs (e.g., serious, severe, or extreme ozone nonattainment areas), fugitive emissions are to be counted in determining major source status for those sources listed in paragraph (2) of the definition. Also, a change is made to category (viii) to change the size of covered municipal incinerators from 250 tons of refuse per day to 50 tons.

Sections 70.3(a)(2) and (3) are being revised to clarify that an area source is the same as a non-major stationary source.

Sections 70.4(b)(11)(iii) and 70.7(a)(2) are revised to change the period for acting on early reductions under section 112(i)(5) of the Act from 9 months to 12 months. Section 70.4(h) is revised to add a provision that EPA can continue to issue phase II acid rain permits when a part 70 program is approved. Section 70.4(i)(1) is added to provide a timeframe for permitting authorities to submit program revisions to EPA in response to revisions to part 70 or a finding by the Administrator that a program revision is necessary. Section 70.4(j) is added to specify what version of part 70 will be used in reviewing initial program submissions. This assumes some initial programs may be submitted after today's revisions to part 70, which may be true for Indian Tribes.

Section 70.5(a)(1)(ii) is revised to remove the 12-month time period for submitting permit revisions except for new stand-alone sources subject to part 70. Section 70.5(a)(1)(iv) is revised to provide flexibility for submittal of acid rain permit applications. Section 70.5(a)(2) is revised to add the provision that an application may be deemed complete if it contains information necessary to allow processing to begin. Section 70.5(c)(8) is revised to require the permit to identify units eligible for emissions trading.

Section 70.6(a)(1)(iv) is added to require permit conditions in accordance with regulations promulgated under section 112(r) of the Act. Section 70.6(a)(3)(iii)(B) is revised to add

provisions for defining "prompt" with respect to reporting deviations from the permit and defining "upset conditions." Clarifying language is added to § 70.6(a)(4) with respect to acid rain SO2 allowances. The wording of § 70.6(a)(8) is changed for purposes of clarity with respect to emissions trading. Section 70.6(c)(1) is revised to be more specific with respect to compliance assurance. Section 70.6(d)(3) is added to provide for notifying the public of sources covered under general permits. Section 70.6(f)(3)(i) is revised to restrict provisions of section 112(r)(9) of the Act from the permit shield.

Section 70.7(a)(7) is added to specify when new applicable requirements that are promulgated during permit issuance or renewal should be included in the permit.

Section 70.8(a)(1) is revised to conform to the new permit revision system the provisions for submittal of permit revision applications, proposed permit revisions, and revised permits to EPA. A provision is added to § 70.8(b)(2) to ensure that affected States are notified of permit revisions at or before the time the public is notified. The provisions for EPA review in §§ 70.8(c), (c)(1), (d)(3), (d)(4), and (e) are modified to account for the new permit revision system. Section 70.8(d)(1) is revised to add a provision that the public be notified of the beginning and end of EPA's review period; this is for purposes of knowing when the public's 60-day petition period begins.

Section 70.9(c) is revised to clarify that EPA may require periodic updates to a permitting authority's permit fee demonstration.

Section 70.10(a) is modified to clarify the application of sanctions and operation of a Federal operating permits program.

A provision is added to § 70.11(a)(3)(i) to indicate that States may include mental state as an element of proof for civil violations for penalties over $10,000.

III. Changes to Section 70.2

A. Advance Approval

1. Summary of Advance NSR Proposal

The EPA, in August 1994, proposed to allow use of the concept of alternative scenarios to provide advance approval to construct and operate new or modified units subject to NSR and section 112(g) (referred to as "advance NSR"). The concept of advance NSR is that the permitting agency decides the applicable NSR requirements before an anticipated project or class of projects is constructed or modified, and then includes that project's requirements in the part 70 permit for the facility. As a result, the project is "pre-approved" by the permitting authority. This pre-approval avoids the need for a separate NSR permit and a part 70 permit revision prior to the project being constructed or operated. The NSR permit is unnecessary because preconstruction review and approval has already occurred for the anticipated project or class of projects, and the NSR permit terms are already established (in the part 70 permit). A part 70 permit revision is unnecessary since the part 70 permit already contains the NSR construction and operation requirements for the project.

The 1994 proposal to treat advance NSR as an alternative scenario under part 70 did not propose to materially alter the underlying NSR State implementation plan (SIP) requirements. The extent to which advance NSR approval is available, or indeed, whether it is available at all, is governed by each State minor NSR program. Since the structures of State NSR programs vary widely, the degree to which advance NSR is available in a particular program (if at all) also varies widely. For example, a State that required a contemporaneous case-by-case review of each minor NSR action for its ambient impact or for a control technology determination would likely have limited opportunities for advance NSR. However, States whose NSR programs apply a given control technology to a category of changes or who can make control technology determinations which remain valid for some time after permit issuance are likely to have opportunities for advance NSR. For example, a flexible permit for a semiconductor

facility in Oregon[1] grants a minor NSR preapproval for a class of new and modified VOC emitting activities within certain "stationary sources" (as defined by Oregon) at the facility. The permit assures that the preapproved changes comply with the State minor NSR regulations by including requirements that preapproved units in certain source categories must employ certain control equipment, and requirements that the facility stay below a national ambient air quality standard (NAAQS)-protective cap. The State of Oregon determined that the preapprovals as set forth in the part 70 permit satisfied the minor NSR requirements, thus allowing the changes to be made without the need for further minor NSR approval or part 70 permit revisions.

The 1994 proposal did not address the extent to which advance NSR would be available in State NSR programs. It simply provided that, where advance NSR is available, the alternative operating scenario provisions of § 70.6(a)(9) offer a mechanism for implementing it through part 70 permits. A permitting authority considering implementing advance NSR must still consider the extent to which its NSR rules allow the use of approaches which forecast specific NSR requirements in advance. Advance NSR demands an ability to predict the construction and operational details of the future project or class of projects with enough certainty to allow the permitting authority to fix relevant NSR requirements in the part 70 permit, including compliance monitoring terms. A permitting authority must also consider whether including advance NSR as an alternative operating scenario in a part 70 permit would satisfy its own procedures for drafting, providing for review of, and issuing NSR permits for the changes which are being preapproved.

In August 1995, EPA further clarified its advance NSR proposal by proposing to add a definition of advance NSR to § 70.2, and by explaining that, in EPA's view, a change subject to an advance approval scenario would not be a change under

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[1]See Intel's Oregon Part 70 Operating Permit, Permit No. 34-2681, which is included in docket A-93-50 as item II-I-3.

section 502(b)(10) of the Act. Rather, it would constitute a switch to an alternative operating scenario under § 70.6(a)(9). As the preamble noted, this interpretation would have two advantages. First, it would allow the use of advance NSR for title I modifications, and avoid the limitation that changes made under section 502(b)(10) cannot be title I modifications. Second, and more important, the 7-day advance notification under section 502(b)(10) which attaches to each change made under that section would not apply to changes under the advance NSR approval. Consequently, where the NSR program allows for advance approval, and the permitting authority approves an alternative scenario containing advance approval, the part 70 permit could allow a source to make the approved change without a part 70 permit revision.

2. Summary of Advance NSR Comments

A large number of industry commenters supported the addition of the definition of advance NSR. However, several commenters raised concerns about the approach. An environmental commenter believed that advance NSR should be allowed only for specifically identified new units whose impacts have already been evaluated. The commenter was concerned that, without this restriction, adverse environmental consequences could result.

A State commenter was concerned that the advance NSR provisions would preclude the State's ability to decide that a separate construction permit is still necessary, i.e., to allow for preconstruction review of the proposed project. The commenter drew a distinction between: (1) preauthorizing in the part 70 permit certain minor NSR changes by including permit conditions that ensure that the preauthorized changes meet minor NSR, and (2) anticipating in a part 70 permit the terms that would result from a separate minor NSR process. In this latter case, the State still completes a separate minor NSR case-by-case approval, but the part 70 permit does not need a revision because it anticipated and already contains the operating terms and conditions that result from the minor NSR process. The commenter

was concerned that if EPA intends to require States to provide advance approval in the first situation, the State could lose its ability to conduct preconstruction review. In addition, two industry commenters were concerned about possible confusion between advance NSR and plantwide applicability limits (PALs).

3. Discussion of Advance NSR

The EPA disagrees with the comment that advance NSR should be allowed only for specifically identified new units, or that adverse environmental consequences could result unless advance approval is limited to such units. The EPA notes that any advance approval must still meet all applicable requirements, including the NAAQS-protective requirements of the SIP and any control technology requirements (e.g., "minor source (best available control technology (BACT)") including case-by-case requirements where applicable. However, EPA believes that advance approvals that meet applicable requirements can apply not only to specifically identified new units, but can also apply to new units identified as part of a class (e.g., storage tanks meeting certain criteria) to the extent that applicable air pollution rules are written so as to regulate such units as a class. For example, the Federal new source performance standards (NSPS), national emission standards for hazardous air pollutants (NESHAP), maximum achievable control technology (MACT) standards, and most SIP limits apply to certain source categories (though parts of some of these standards, such as monitoring, are source specific and determined on a case-by-case basis). By the same token, NSR requirements may allow NSR permit terms to apply categorically, such that each time a unit in the category is added, the relevant NSR requirements would apply to that unit in a predictable way that could be built in to the permit in advance.

The EPA notes that, if the change triggers a new applicable requirement other than NSR, (e.g., NSPS), that requirement would also need to be included in the permit, which would require a permit revision. However, as discussed below, an advance

approval may also be written to cover applicable requirements other than NSR. Finally, the Agency emphasizes that the permitting authority may establish additional permit terms as needed to ensure that changes under an advance approval comply with the Act and the SIP (e.g., a NAAQS-protective cap, or a requirement to screen for ambient impact violations). Such an approach is demonstrated by the Intel permit in Oregon.

The EPA also disagrees with the comment that advance NSR would preclude a State's ability to require a construction permit or to allow for preconstruction review. As an initial matter States are not required to provide for advance NSR in SIP's or part 70 programs. Moreover, as this is not a program requirement, any State establishing such a program would have flexibility in deciding what types of changes required preconstruction review and a preconstruction permit.

In the first situation mentioned by this commenter, where a source can avoid review at the time of the change because the part 70 permit allows changes which are preauthorized, EPA does not see this as a problem since this is one of the objectives of advance NSR. The State has not lost its ability to conduct preconstruction review. Rather, it has conducted preconstruction review in advance, and has included the resulting terms in the part 70 permit in advance of the change.

In the State commenter's second situation, where the part 70 permit anticipates the terms that would result from an NSR process and the part 70 permit need not be revised, EPA notes that the source must still await an affirmative approval under the State's NSR program before it can construct or modify the unit. Thus, this is not strictly advance approval. Although it avoids the need for a part 70 permit revision, the source must still await case-by-case NSR authorization, which will likely generate new permit terms. If the State rules require such case-by-case approval, then an advance approval would likely not be workable, and the State need not provide it. If the case-by-case review under NSR creates new terms or conditions, these would

need to be incorporated into the part 70 permit through a part 70 permit revision and would thus not be an advance approval. The State has the ability to decide whether a construction permit is necessary. However, if the State determines that the advance approval can render a construction permit unnecessary for some changes by fully anticipating the minor NSR terms in the part 70 permit, EPA sees little benefit to withholding advance approval of such changes.

To further address the State commenter's concern that the proposal could be read to override a State's ability to require preconstruction approval, EPA notes that a State's ability to grant advance NSR approval is limited by the requirements of the Act and the applicable SIP. Beyond that, it is properly an NSR issue to be decided by the State. Whether to allow for advance approval of minor NSR requirements in the first instance is a decision within the State's discretion under its minor NSR program, and what sort of conditions to place on specific permits containing advance approval provisions is also within the State's discretion. As discussed below, alternative operating scenarios (including advance approvals) under § 70.6(a)(9) are subject to approval by the permitting authority. Consequently, part 70 does not require any permitting authority to approve an alternative scenario proposed by a source, if in the judgment of the permitting authority, the scenario: (1) does not comply with applicable requirements, including those of the NSR program; (2) is not enforceable as a practical matter; or (3) is not reasonably anticipated.

Furthermore, nothing in today's rulemaking requires a State to revise its NSR program to provide for advance approval. Although EPA believes the advance approval concept has many benefits, as demonstrated in permits issued by States that have already provided for it, the Agency acknowledges that the availability of advance NSR under any particular NSR program is best determined by the permitting authority. The EPA defers to States to determine whether their NSR programs allow for advance

approval of certain projects and what conditions and restrictions apply (e.g., pollutants covered, duration of advance approval, types of changes eligible, etc.). Where the State NSR program provides for such an approach, today's part 70 revisions provide for that approach to be implemented through part 70's alternative operating scenario provisions.

As for comments about confusion between advance NSR and PALs, EPA today is providing further clarification of the meaning of the two terms. The EPA notes that these are two tools used in designing flexible permits, but differ in their basic purpose and structure. In an advance NSR approval, the State forecasts the NSR or other applicable requirements that would apply to a particular project (or class of projects), and then develops part 70 permit terms to comply with NSR and other applicable requirements. In contrast, a PAL is a limit taken to avoid triggering NSR, specifically major NSR, once the PAL is established. Compliance with the PAL avoids triggering major NSR; it does not conduct the NSR in advance. As a result, a PAL by itself would not avoid the need to obtain a minor NSR permit if a change is made that is subject to minor NSR, nor would it avoid the need to revise a part 70 permit to add additional applicable requirements (e.g., NSPS). To avoid minor NSR and part 70 permit revisions, a source would need to use a PAL in combination with advance NSR approval and other advance approvals as appropriate to meet the source's flexibility needs.

The EPA also wishes to further clarify the definition of advance NSR as it pertains to major NSR under parts C and D of the Act. The proposed definition of advance NSR appeared to treat major and minor NSR equally regarding the availability of advance approvals. The basic part 70 requirement states that if an advance approval can be structured to meet applicable requirements in advance, it should be eligible for incorporation into a part 70 permit as an alternative operating scenario. However, while the Agency has significant experience with structuring advance minor NSR approvals that meet all applicable

minor NSR requirements, the Agency has no experience with such an approach for major NSR. Furthermore, the Agency believes that many of the requirements of the major NSR program (e.g., contemporaneous BACT or lowest achievable emissions rate (LAER) determination, air quality analysis, etc.) are project-specific and time-sensitive, and are thus not consistent with the concept of advance approval. Therefore, EPA believes that advance approval for projects subject to major NSR is unworkable. **(Note: EPA is considering regulatory language to reflect this policy in the final part 70 revisions.)**

Finally, while the 1994 and 1995 proposals focus on advance NSR approvals, the Agency believes that States may provide advance approval for other applicable requirements. While NSR programs typically require minor NSR permits to include terms and conditions to assure compliance with all applicable Federal and State requirements, a part 70 permit that provides advance approval of just the NSR-driven requirements would fail to accommodate in advance other applicable requirements, such as NSPS or SIP requirements. Similarly a change could be made that is exempt from minor NSR, but still triggers some other applicable requirement. There are two options for addressing such situations under today's revisions: (1) the permit could be revised to incorporate the non-NSR applicable requirements (many of which could be eligible for streamlined incorporation through the notice-only revision process described in section VIII.C.3. of this preamble); or (2) an advance approval could be developed for the non-NSR applicable requirements. Determining permit terms for these applicable requirements is often straightforward and can, for many types of applicable requirements, be done in advance. As a result, EPA expects that advance approval should be available for some non-NSR applicable requirements. Therefore, EPA is changing the proposed term "Advance NSR" to "Advance Approval" and is revising this definition to accommodate other applicable requirements.

B. Alternative Operating Scenarios

The EPA proposed in August 1995 to clarify the use of alternative operating scenarios by adding to § 70.2 a definition of the term "alternative operating scenarios." Although alternative operating scenarios were allowed under § 70.6, the original part 70 did not explicitly define this term. The proposed definition stated that alternative operating scenarios are part 70 permit terms that assure compliance with different modes of source operation for which different applicable requirements apply and for which the source is designed to accommodate. Commenters generally supported adding this definition. However, several industry commenters were concerned about two aspects of the proposed definition. First, four industry commenters objected to the inclusion of the phrase "designed to accommodate." They argued that this term is not defined in part 70 and could be interpreted in a way that overly restricts the availability of alternative operating scenarios. Two of these commenters also argued that if alternative operating scenarios were limited only to those changes which the source is currently designed to accommodate, advance approval of future new units and modifications would not be allowed as alternative scenarios since the units a facility is designed to accommodate include only those units currently installed, not new units or modifications not considered in the design.

The EPA agrees that the usage of the phrase "designed to accommodate," absent a definition of the term, is unclear. More importantly, EPA believes that the phrase restricts the availability of advance approvals as a subset of alternative operating scenarios, since it could be read to exclude advance approval of new units or modifications not considered in the facility's original design. The EPA originally felt that inclusion of the "designed to accommodate" phrase would properly restrict alternative operating scenarios to those changes which did not require case-by-case review and approval by permitting authorities, since approval of the original project would have also approved any change which could be accommodated within that

project's design, without the need for addition approval by the permitting authority. However, after further consideration of the proper scope of advance approvals discussed above, EPA believes that certain changes which the source is not designed to accommodate may still be approved in advance by the permitting authority and authorized as alternative operating scenarios. The Agency believes that new units or modifications should be eligible for advance approval as alternative operating scenarios where the State NSR program allows it and where the permitting authority approves the alternative scenario(s) as such. For these reasons, EPA is deleting the phrase "designed to accommodate" from the definition of alternative operating scenarios and adding language clarifying that alternative scenarios may include advance approvals.

Commenters were also concerned about the phrase "for which a different applicable requirement applies," on the grounds that, if alternative operating scenarios were limited only to those for which a "different" applicable requirement applies, some changes that should be allowed would be excluded. Examples include a change from a scenario with an applicable requirement to a scenario where that requirement is not applicable, or a change under an advance approval where all the current requirements still apply, but a new one applies as well. To address the concerns with this phrase, EPA is making a minor change to clarify that the purpose of an alternative operating scenario is to allow reasonably anticipated changes at a source which change the set of applicable requirements at a source. Such changes could include the following: (1) scenario B adds a requirement to the requirements under scenario A, while the requirements under A remain applicable; (2) scenario B removes a requirement from the requirements under scenario A; or (3) scenario B replaces one or more of the requirements of scenario A. To reflect this purpose, EPA is changing the definition to read "terms or conditions in a part 70 permit which assure that different modes of operation comply with the applicable

requirements relevant to each mode of operation."

C. Eligible Indian Tribe

This topic is discussed in section XI. of this preamble.

D. Emissions Cap Permit

In August 1995, to promote greater certainty in implementing caps under section 502(b)(10), EPA proposed to include a definition of the term "emissions cap permit." This term would be used in the proposed § 70.4(b)(3)(xiv), which, together with § 70.4(b)(12)(i), would define part 70 program requirements for the issuance of permits containing emissions caps. A number of commenters expressed confusion about the proposed definition of emissions cap permit. Specifically, commenters were confused about whether this term could be used interchangeably with the term "PAL" and, if not, what the distinction between these terms would be. Commenters were also confused about the link between this definition and the requirement in § 70.4(b)(12) for States to issue permits that allow trading under emissions caps. Two additional industry commenters felt that the proposed definition was unclear and could unnecessarily limit the types of caps that could be constructed by prohibiting multiple caps within a single facility.

After considering the comments, and after evaluating other actions that EPA is taking today regarding emissions cap provisions, EPA has decided not to promulgate a definition of emissions cap permit. For reasons discussed in section V.A. of this preamble, EPA has decided not to promulgate the proposed § 70.4(b)(3)(xiv), which would have required that States demonstrate the authority to issue emissions cap permits and permits containing advance NSR. Because this proposed provision was the only provision that would have referenced the term emissions cap permit, the definition is no longer necessary. Therefore, primarily because the definition is not needed, and also in light of the confusion surrounding its use, EPA believes that it would be most appropriate to leave this term out of the part 70 regulations. In lieu of a regulatory definition, EPA

intends to clarify the types and uses of emissions caps elsewhere in today's preamble, and in future policies and/or guidance documents promoting the design of flexible permits.

E. Indian Tribe

This topic is discussed in section XI. of this preamble.

F. Major Source

1. Support Facilities

a. Summary of Proposal on Support Facilities

The EPA proposed in August 1994 to clarify the definition of major source (for the portion of the part 70 definition addressing major source under parts C and D of title I of the Act, i.e., the major NSR provisions) with respect to when to include the emissions of support facilities when determining if a source is major. The part C and D major source definition provides that when facilities are contiguous or adjacent, are under common control, and are classified in the same 2-digit SIC group, they are aggregated as part of the same major source. Furthermore, consistent with the original part 70 proposal preamble, with longstanding NSR policy, and with the NSR regulations promulgated on August 7, 1980 (45 FR 52695), and further clarified on November 28, 1989 (54 FR 48870), facilities may be aggregated, even if they have different SIC codes, if they are "support facilities" that are integrally related with the primary activity at the site.

The EPA proposed to add regulatory language to the part 70 definition of major source codifying for title V purposes EPA's longstanding interpretations regarding this subject. Specifically, the August 1994 proposal would amend the part 70 definition of major source to make clear that any stationary source that supports another source must be considered a support facility and part of the same source regardless of the 2-digit SIC code for that support facility. Furthermore, the proposal stated that a facility would be considered a support facility if greater than 50 percent of its output is dedicated to the activity it supports.

b. Summary of Comments on Support Facility

Several industry commenters expressed opposition to including the support facility concept in part 70 major source determinations, arguing that this action would be contrary to Congressional intent, inappropriately link dissimilar sources, and add sources to the part 70 program. These commenters suggested that the language and legislative history of the major source definition in section 501(2) of the Act prohibit EPA from aggregating a support facility with a primary source that has a different SIC code as part of the same major source. They argued that EPA should define major source solely according to what would be aggregated under a single two-digit SIC code.

Several industry commenters also argued that the proposed regulatory language would cause confusion and would be difficult to implement. In particular, several industry commenters expressed confusion about the requirement that a facility be considered a support facility if 50 percent of its output is dedicated to the facility which it supports. They argued that terms like "support," "output," and "dedicated" are not defined and are difficult to implement. One commenter also argued that the level of support at some sources typically varies from year to year, making the 50 percent test difficult to implement.

Three State and local agency commenters also commented on the proposed regulatory language for support facilities. They generally supported the clarification of the definition of major source offered by the proposal, noting that the proposed definition is consistent with longstanding NSR policy, as stated in the August 7, 1980 rulemaking. However, one local agency commenter noted that the definition should not unnecessarily restrict the authority of permitting authorities to make major source determinations given that permitting authorities have the most direct knowledge of source operations.

c. Discussion of Support Facility

The EPA believes that portion of the part 70 major source definition dealing with the term as defined in title I and

section 302 of the Act should not be based on a strict SIC test that disregards support relationships. The Agency disagrees with commenters who suggested that the language and legislative history of the major source definition in section 501(2) prohibit EPA from including a support facility with a different SIC code as part of a major source. Rather, EPA believes that the approach used in NSR in defining major source, an approach which utilizes the SIC code as the central organizing principle for determining the scope of a stationary source but also includes use of the support facility test, is appropriate for purposes of Title V.

It is important to recognize that the pertinent language of the statute is silent on the topic of how, if at all, SIC codes should be used for collocation purposes. Indeed, section 501(2) takes a broad approach to the types of collocated sources that may be aggregated for purposes of title V major source determinations. This language clearly can support a variety of approaches to aggregating sources according to industrial groupings. If any direction can be taken from the statute itself, it is simply that Congress intended to broadly include collocated sources in major source determinations, a purpose that is quite consistent with a support facility test.

In explaining its proposed decision to adopt the support facility test in the preamble to the proposed original part 70 promulgation [56 FR 21724, May 10, 1991], EPA noted that the House Report's explanation of identical collocation language in section 182(c) of the Act (regarding serious ozone nonattainment areas) sheds light on how the title V definition of major source should be interpreted. The portion of the House Report cited by EPA provides:

> The definition of "major source" here and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The Committee understands this to mean a group of sources with a common industrial grouping, i.e., the same two-digit SIC code. It is the approach followed today by EPA as a result of the Alabama Power litigation. It avoids the possibility that dissimilar sources, like a power plant and an adjacent coal

> mine, will be considered as the same "source" because of common ownership. (56 FR 21724 (May 10, 1991) (citing House Report at 236-37).

The EPA concluded that "[t]he legislative history reference to Alabama Power and EPA's current approach[] suggest that aggregation by SIC code should be done in a manner consistent with established NSR procedures" (id.). As noted, these established NSR procedures generally rely on SIC codes but also provide for grouping of support facilities with the facility they support, even where the support facilities and the primary activity have different SIC codes.

Application of the support facility test is consistent with the broad approach to collocation issues described by section 501(2). Nothing in the statute precludes the Agency from adopting a common-sense industrial grouping approach for title V as it has for NSR. Similarly, nothing precludes the Agency from grouping facilities with different two-digit SIC codes (in circumstances such as those in which the support facility test is applied) where a failure to group such facilities would artificially divide into separate "sources" facilities that comprise a single entity relative to economic, functional, and air-quality perspectives.

While certain commenters argued that the House Report language cited above rejects the support facility test, EPA believes that the language read in context indicates that this statement from the House Report was directed not against the support facility test, but in support of EPA's general application of the SIC code rule. In fact, the example in the legislative history of the power plant and coal mine appear anomalous in light of the passage's general support for EPA's approach to aggregation of sources. While EPA's collocation rules generally do not provide for the aggregation of emissions from sources with different SIC codes, EPA's historic approach to collocation under the NSR and Prevention of Significant Deterioration (PSD) programs has been that a strip mine and an adjacent power plant controlled by the same entity should be

treated as a single stationary source. Indeed, EPA made this precise finding in a 1989 rulemaking[2], a finding which industry failed to challenge.

The EPA has thus concluded that application of the established NSR approach, including its collocation provisions, is generally quite consistent with the legislative history cited by commenters. The EPA submits that an aggregation policy that addresses support facilities is consistent with the broad approach taken by Congress in the language of the statute and in the legislative history, both of which demonstrate a clear intention that EPA follow its existing policies. To the extent that the House Report reference to a collocated strip mine and power plant could be read as contrary to EPA position in today's part 70 revisions, EPA does not regard the isolated comment as sufficiently clear and convincing under general rules of construction to overcome the statutory language and structure and the Agency's consistent and longstanding position.

The EPA also does not agree that codifying the support facility language would add sources to the part 70 program that were not intended by Congress to be included. Because the support facility language is consistent with longstanding NSR policy and practice, it would bring sources into part 70 that would already be classified as major under NSR. (though some of these sources may not needed a major NSR permit because they were built before States adopted their NSR rules, and were thus "grandfathered"). This is consistent with section 501 of the Act, which states that a major source for title V purposes includes any source that is a "major stationary source" as defined in section 302 or part D of title I. Furthermore, it ensures that implementation of title V and of the NSR program are consistent. The EPA finds no reason to group sources under part 70 differently from how they are grouped under NSR, nor have

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[2] *Requirements for Implementation Plans: Surface Coal Mines and Fugitive Emissions; Approval and Promulgation of Implementation Plants,* 54 Fed. Reg. 48870, 48882 (November 28, 1989).

any commenters presented convincing reasons why EPA should, in part 70, depart from its longstanding position under NSR.

Although EPA is including the support facility test in the part 70 major source definition, EPA acknowledges comments that the proposed regulatory language may be confusing in certain respects. Therefore, as explained below, EPA is making three minor changes to the proposed regulatory language. These changes, together with this preamble discussion, are intended to clarify the application of the support facility approach. These clarifications pertain to the use of the support facility test in making major source determinations under NSR, and are also intended to ensure that the use of the support facility test in major source determinations for part 70 is consistent with use of the support facility test in the NSR program.

First, EPA has concluded that it is not appropriate to codify the proposed language which states that a stationary source is considered a support facility if at least 50 percent of its output is dedicated to the primary activity at the site. While a 50 percent test for support is an appropriate presumption that is consistent with EPA practice for NSR major source determinations, EPA believes that support facility relationships should always be established in light of the particular circumstances of the sources being evaluated[3]. The EPA is concerned, as are some State commenters, that establishing a rigid 50 percent test in part 70 would preclude permitting authorities from using their own judgement as to the most appropriate major source determination, and could in some cases conflict with past NSR major source determinations by permitting authorities. In addition, EPA agrees with comments that a rigid 50 percent cutoff fixed in regulations may be difficult to

[3]For more information, see the NSR regulations promulgated on August 7, 1980 (45 FR 52695), and the memorandum from John S. Seitz dated August 2, 1996 entitled "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act."

implement in some cases (e.g., where the level of support exceeds 50 percent in some years but not others.) Therefore, to maintain consistency with past major source determinations, to alleviate potential implementation difficulties, and to preserve permitting authority discretion to make the most appropriate judgments, EPA is not codifying the presumptive 50 percent test for support in part 70. Instead, part 70, like NSR, gives the permitting authority discretion to determine when a support activity should be designated as a support facility (and thus aggregated with the primary activity) in making major source determinations under title I and section 302 of the Act, consistent with EPA policies addressing such determinations.

While the Agency, as noted above, is deleting the proposed regulatory 50 percent cutoff for determining support, EPA expects permitting authorities to follow certain basic criteria in making support facility determinations for part 70, just as they have done for NSR. These basic criteria are: (1) the degree to which the support activity supplies material inputs to the primary activity (i.e., percent output), and (2) the degree to which the support activity provides services to the primary activity (i.e., percent output). Where either of these is 50 percent or greater, EPA generally expects permitting authorities to conclude that a support facility exists, and expects these activities to be aggregated with the primary activity (if the activities are otherwise adjacent/contiguous and under common control.) In addition, where a support activity provides materials or services to two or more primary activities, permitting authorities generally should aggregate the support activity with the primary activity receiving the most support. Similarly, if 50 percent or more of the output from the candidate support activity goes off-site, the support activity may be considered a separate stationary source, not a support facility.

While the application of these basic criteria is straightforward in most cases, permitting authorities also have discretion to consider additional factors as necessary to make

support facility determinations. Support facility determinations can depend upon a number of financial, functional, and contractual or other legal factors, which include, but are not limited to: (1) the degree to which the support activity receives materials or services from the primary activity (which may indicate a mutually beneficial arrangement between the primary and secondary activities); (2) the degree to which the primary activity exerts control over the support activity's operations; (3) the nature of any contractual arrangements between the facilities; and (4) the reasons for the presence of the support activity on the same site as the primary activity (e.g., whether the support facility would exist at that site in the absence of the primary activity). Where such criteria indicate a support relationship, permitting authorities may conclude that a support activity contributing more or less than 50 percent of its output may be classified as a support facility and aggregated with the facility it supports (provided the support activity is also adjacent/contiguous and under common control).

The second change to the proposed support facility language pertains to the relationship between the support facility concept and the two other factors which must be considered in making major source determinations: (1) whether sources are "located on one or more contiguous or adjacent properties," and (2) whether they are "under common control of the same person (or persons under common control)." Part 70 provides, in the second sentence of the major source definition, that facilities need not be aggregated unless they are adjacent or contiguous and are under common control. The proposal would have also required that a facility be adjacent or contiguous and under common control before being classified as a support facility. The EPA believes that this repetition of the adjacent/contiguous and common control criteria is redundant and potentially confusing. While it is true that support activities are not aggregated with their primary activities unless both sets of activities are also

adjacent/contiguous and under common control, EPA believes that the first sentence of the major source definition clearly reflects this fact, and the additional language is unnecessary.[4]

Finally, the Agency notes that the revised part 70 definition of major source now provides that a support facility is a facility which "conveys, stores, or otherwise assists in the production of the principal product." This language originally appeared in the preamble to the August 7, 1980 PSD regulations and EPA believes that this language is an appropriate clarification to add to the part 70 regulatory language for support facilities.

2. HAP Source Applicability Issues

The EPA also proposed to clarify the major source definition with respect to two issues in determining part 70 applicability for sources of HAPs. The first of these issues is whether a group of sources which are contiguous and under common control must consider the two-digit SIC codes of each facility in determining whether the facilities must be aggregated for purposes of determining if they are a major source for HAP emissions. The second issue relates to whether fugitive emissions of HAPs must be counted in making major source determinations.

The EPA proposed, in August 1994, to revise part 70 to conform with section 112(a) of the Act and the implementing regulations in 40 CFR part 63 (see § 63.2, definition of major source.) The proposal would clarify that, in determining part 70 applicability for HAP sources, major source is defined as any stationary source or group of stationary sources that emits or has the potential to emit above a threshold level of HAP emissions regardless of SIC code. This proposed clarification

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[4]In practice, the three factors comprising the major source definition (adjacency/contiguity, common control, and SIC code/support) are sometimes interrelated and cannot always be evaluated in sequential fashion. See, for example, letter from Matt Haber, U.S. EPA Region IX to Simpson Paper Company (November 27, 1996) or

was based on the need to make the part 70 major source definition consistent with the part 63 major source definition, and reflects the title V definition of major source in section 501 of the Act, which includes all major sources under section 112.

A large number of commenters objected to the proposed clarification on the grounds that the part 63 major source definition contradicts longstanding source aggregation policy and legislative history of the Act because it does not rely on SIC code in making major source determinations. The EPA disagrees, noting that the part 63 major source definition was upheld in National Mining Association (NMA) vs. EPA, 59 F.3d 1351 (D.C. Cir. 1995). The court, in denying a petition for review of part 63 on this issue, held that EPA's section 112 definition of major source, which does not consider source categories or two-digit SIC codes, was a reasonable interpretation of the statute.

In addition, a smaller number of commenters opposed the proposed clarification on the grounds that there is no reason why the part 63 and part 70 major source definitions should be identical in their treatment of HAP sources. The EPA disagrees with this argument as well. Although EPA agrees that this aspect of the part 70 major source definition departs from longstanding practice under NSR, it does so to track the separate treatment of HAPs set forth by Congress in the 1990 Amendments.
Section 501(2) requires that the part 70 major source definition include section 112 major sources, while section 112 aggregates facilities for major source purposes based exclusively on contiguity and common control (without regard to source category or SIC code). Moreover, as noted in the August 1994 proposal preamble, EPA believes that the implementation of section 112 will be enhanced by providing this clarification because it ensures that all major sources as defined in part 63 must apply for a part 70 permit. Therefore, EPA is promulgating this change to § 70.2 as proposed. However, as noted elsewhere in this preamble, EPA is providing for separate treatment for R&D activities in determining whether a source is major for part 70

purposes.

Regarding the second issue, fugitive emissions of HAPs, EPA proposed in August 1994 to clarify that HAP fugitive emissions be included in the determination of major sources of section 112 pollutants. The EPA explained in the proposal preamble that the original part 70 required that HAP fugitive emissions must be included, but the Agency also proposed clarifying regulatory language on this point.

Several industry commenters argued that requiring inclusion of fugitive emissions for a HAP source category would require an affirmative determination by the Administrator under section 302(j) of the Act that fugitives must be counted for that source category. As explained in the August 1994 proposal preamble, EPA believes that the section 302(j) rulemaking requirement does not apply in the context of sources that are major under section 112 because the section 112 major source definition is distinct from the section 302(j) major stationary source definition used for parts C and D of title I of the Act. As with the HAP source aggregation issue, this issue was the subject of litigation in the context of the part 63 regulations implementing section 112. In NMA vs. EPA, the court held that section 112(a)(1) can be read to expressly provide that all emissions are to be counted in determining whether a source is major. Noting that section 302(j) requires the Administrator's determination "except as otherwise expressly provided in the Act" the Court concluded that section 112(a)(1) satisfies this exception clause, and therefore, fugitive emissions may be counted for section 112 sources without a section 302(j) rulemaking.

As noted above, for legal and policy reasons, EPA believes that the part 70 definition of major source as it applies to HAP sources should be consistent with the part 63 definition of major source. Therefore, because the part 63 definition requires consideration of fugitives, the part 70 definition will continue to require this also. Furthermore, as proposed, clarifying

language for this provision is added to the definition of major source in § 70.2.

3. Listed Source Categories for Fugitive Emissions.

The EPA also proposed to change the major source definition with respect to the list of source categories whose sources must count fugitive emissions in making major source determinations under section 302 of the Act. In the August 1994 notice, EPA proposed to change paragraph (2)(xxvii) of the section 302-based definition of major source, which refers to source categories regulated under section 111 or 112 of the Act which are not specifically listed in paragraphs (2)(i)-(xxvi). The original part 70 regulations required any source regulated by a section 111 or 112 standard to count fugitive emissions in making major source determinations under section 302. Although no date was given, the implicit date was the promulgation date, July 21, 1992. However, a petitioner challenged these regulations on procedural grounds, asserting that EPA may not require sources in these categories to count fugitive emissions when determining major source applicability until the Administrator makes an affirmative determination by rule under section 302(j). Since no such determination has been made for source categories regulated as of August 7, 1980, the August 1994 notice contained proposed language requiring only sources in categories regulated before August 7, 1980 to count fugitive emissions.

The August 1995 notice further refined this proposed language to avoid the need to revise the date contained in paragraph (2)(xxvii) of the part 70 major source definition each time EPA makes an affirmative determination under section 302(j) in the future. Rather than including a specific date, the proposed language would require fugitives to be counted for sources in any source category for which the Administrator has made an affirmative determination under section 302(j) of the Act. This change would not by itself require fugitives to be counted for source categories regulated by section 111 or 112 standards after August 7, 1980. Rather, it would provide that if

and when a 302(j) determination occurs for such a category, fugitive emissions would need to be counted in determining part 70 major source status under paragraph (2) of the major source definition.

Three commenters representing State and local permitting authorities opposed the August 1994 proposal to insert the August 7, 1980 date into the major source definition. They argued that sources in the NSPS and NESHAP categories, including those regulated after August 7, 1980, are the more significant sources of air pollution and should be regulated under title V. One commenter also noted that the original part 70 required inclusion of source categories regulated since August 1980, and to exclude these now could lead to serious shortfalls in part 70 fee revenue since States used the original part 70 in setting fee levels. The commenters indicated that if EPA makes the proposed change, the Agency should undertake 302(j) rulemakings for the additional categories.

In the August 1995 notice, EPA did indicate that a proposed rulemaking to revise NSR regulations implementing parts C and D of title I of the Act would be published in the near future which would solicit comment on amending the listed source categories for which fugitive emissions must be counted when determining whether a source is major. However, EPA's recently proposed revisions to the NSR regulations (61 FR 38249), published on July 23, 1996, did not include a proposal to amend the list of source categories. The EPA does not believe that today's rulemaking is now the appropriate place to conduct the necessary 302(j) rulemakings and has not yet proposed any such action. However, the Agency is still considering how best to conduct 302(j) rulemakings. Where appropriate, EPA intends to propose such rulemaking(s) as soon as practicable following today's part 70 revisions. Until such time as these rulemakings are conducted, EPA considers source categories regulated by section 111 or 112 standards after August 7, 1980 to be "unlisted source categories," and sources in these categories would not be

required by EPA to count fugitive emissions in major source determinations under section 302 of the Act.[5]

The EPA is sensitive to the concern that this change to the part 70 regulations could eventually result in a fee shortfall for some State programs. The EPA recognizes that States may have relied on the original part 70 language in determining fees. The EPA responds by noting that States are free to adopt (or, in this case, retain) part 70 programs with more stringent applicability provisions than EPA, including provisions requiring the counting of fugitives for source categories not listed by EPA. By today's action, EPA does not intend to encourage States to de-list any fugitive emissions source categories contained in their current part 70 programs, especially in light of the Agency's intent to undertake appropriate regulatory revisions to update the list. In addition, EPA notes that in the absence of more stringent minimum applicability provisions, States have the ability to revise fee schedules as necessary to assure adequate revenue.

Commenters did not object to the approach proposed in August 1995 that would eliminate the language defining source categories in paragraph (2)(xxvii) by a specific date, and that would instead define them by whether they had been listed by the Administrator in a 302(j) rulemaking. However, two industry commenters suggested that a better approach would be to include the list of categories defined by paragraph (2)(xxvii) directly in part 70 and update it through each subsequent 302(j) rulemaking. The EPA is considering the merits of this approach, and will decide whether to list 302(j) source categories in the preamble versus the regulations in the upcoming 302(j)

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[5] As described in the August 1995 preamble (60 FR 45547), any sources subject to section 111 or 112 standards promulgated since August 7, 1980 are not considered listed source categories for title V purposes. These sources would not have to count fugitives unless and until EPA completes a section 302(j) rulemaking requiring that fugitives be counted. However, as noted above, EPA plans to undertake rulemaking to update this list of source categories.

rulemaking(s).[6]

The EPA also proposed in August 1995 regulatory language that deletes from paragraph (2)(xxvii) the phrase "but only with respect to pollutants regulated for that source category." This phrase, contained in part 70 as promulgated in July 1992, required the consideration of fugitive emissions for listed section 111 and 112 source categories only for the pollutants regulated by the relevant section 111 or 112 standard. Thus if, for example, an NSPS regulates particulate matter, but not VOC, emissions for a source category, a source in that category, pursuant to the "but only..." phrase, would not have to consider fugitive VOC emissions in making a section 302 major source determination for VOC. The EPA proposed to delete this phrase because it is inconsistent with longstanding NSR policy on this issue and because the Agency did not follow the correct procedural steps when incorporating this phrase into the original part 70.

Five industry commenters opposed the deletion of the phrase "but only with respect to pollutants regulated for that source category" from the major source definition. They argued that this deletion would be an inappropriate expansion of the sources that must consider fugitive emissions when determining major source status. Two commenters argued further that placing the focus only on regulated air pollutants is appropriate. They felt that the fact that EPA has not issued a section 111 or 112 standard governing a particular pollutant implies that such a pollutant does not pose a significant threat to public health and that its fugitive emissions should therefore not be counted in major source determinations under section 302 of the Act. The

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[6]The current list of section 111 and 112 source categories regulated as of August 7, 1980 includes sources subject to the following standards: 40 CFR part 60 (New Source Performance Standards) subparts D, Da, E, F, G, H, I, J, K, Ka, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, GG, HH, JJ, KK,and MM, as well as 40 CFR part 61 (National Emissions Standards for Hazardous Air Pollutants) subparts C, D, E, F, and M.

EPA also disagrees with the comment that the requirements of sections 502(b)(5)(A) and 504(a) of the Act are met if the permit contains all then-applicable requirements at issuance or renewal, and the permitting authority has ample authority to ensure that it does. The requirements of 502(b)(5)(A) cited by the commenter require that the permitting authority have authority to issue permits and assure compliance with "each applicable standard, regulation or requirement," which broadly read, means that each time a change is made to which an applicable requirement applies, the permit must be revised to assure compliance with that applicable requirement, unless the permit already provides for compliance with that applicable requirement. In the Agency's view, the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement, except where the permit already complies with the applicable requirement by providing for advance approval of the change without a permit revision.

The EPA does not now see a legal or policy basis to retain the current regulatory language, which represents a significant departure from longstanding policy and legal interpretation of a section 302(j) rulemaking under NSR. For the purposes of the NSR regulations (40 CFR parts 51 and 52) EPA has determined, pursuant to 302(j), that all fugitive emissions from sources within any listed source category should be counted in major source determinations, without limiting the emissions counted to only those pollutants regulated by a section 111 or 112 standard for a particular source category. Furthermore, the Act itself contains no language restricting consideration of fugitives solely to pollutants regulated under section 111 or 112. Section 302(j) of the Act requires consideration of fugitive emissions of any air pollutant as determined by rule by the Administrator. Finally, section 501 of the Act defines major source for title V purposes to include "major stationary sources" as defined in section 302.

This provision suggests that the part 70 major source definition should be consistent with, rather than depart from, EPA's previous determinations of when fugitives are to be counted in making section 302 major source determinations. Therefore, EPA is revising this provision in part 70 to be consistent with parallel language in parts 51 and 52.

Moreover, EPA sees no policy basis to treat fugitive emissions differently for NSR and title V purposes under its longstanding two-step interpretation of the section 302(j) rulemaking requirement. As discussed in the August 1995 proposal at 60 FR 45547, under that first step EPA would propose to list a source category if emissions from that category have a potential for significant air quality deterioration, and would make a final listing unless commenters demonstrated that the social and economic costs of regulation would be unreasonable in comparison to the benefits. On this basis, EPA found for NSR purposes on August 7, 1980 that all source categories regulated under section 111 or 112 as of that date met the test for final listing. The EPA sees no reason why it should reach any different conclusion for title V purposes as to sources listed under NSR. This is so regardless of whether a given major source is actually regulated under NSR as a result of construction or modification or is simply operating unchanged in an NSR-listed source category. For the latter group of sources, which are nonetheless subject to applicable requirements (e.g., RACT or other SIP emission limits), EPA does not expect that commenters would be able to show that the costs of compliance with part 70 would outweigh the benefits.

Finally, EPA notes that the larger question of applicability of part 70 to sources which would be major under NSR but not major under part 70 (for example, because fugitive emissions were counted for NSR, but not for part 70) is answered independently of the part 70 major source definition. Even if the "but only..." language were retained, major NSR sources would still have to obtain part 70 permits. As described in section III.D.2.

of this preamble, any source required to have a permit under parts C and D of title I must obtain a part 70 permit, pursuant to section 502(a) of the Act.

4. Unlisted Sources of Fugitive Emissions

In interpreting the application of the original part 70 definition of major source to unlisted sources of fugitive emissions (i.e., sources not in the fugitive emissions categories listed by the Administrator pursuant to section 302(j) and discussed above), EPA adopted an interpretation consistent with its approach under NSR. Thus, the Agency initially interpreted its major source definition as requiring that adjacent, commonly controlled ("collocated") sources must be combined under certain circumstances for purposes of making major source determinations. (See Section III.F.1. Summary of Proposal on Support Facilities). Under this interpretation, the collocation provisions apply to sources regardless of whether the source has been listed by rule under section 302(j) of the Act. Further, EPA interpreted the collocation rule as requiring fugitive emissions from unlisted sources to be considered in major source applicability determinations to the extent an unlisted source is collocated with a listed source and the primary activity of the operation as a whole falls within a listed source category.

The NMA and American Forest and Paper Association petitioned for review of part 70 in part because of the Agency's interpretation of these collocation provisions. The petitioners asserted that the Agency's interpretation of its collocation provisions would have the effect of subjecting unlisted sources of fugitive emissions to the requirements of title V without undertaking a section 302(j) rulemaking.

The proper interpretation of the rulemaking requirement in section 302(j) was addressed by EPA in 1989 in the context of determining whether surface coal mines should be added to the section 302(j) list of sources. (54 FR 48870, November 28, 1989). In the final rule, EPA determined that the section 302(j) rulemaking provision did not provide a basis for making an

exception to its collocation rules under the NSR program. Citing Alabama Power, the Agency explained that while section 302(j) requires EPA to conduct a rulemaking to include fugitive emissions in applicable emissions threshold calculations, it is irrelevant in defining the scope of the term "source" and in applying substantive NSR requirements (id. at 48881). The EPA recognized that its established collocation procedures could have the effect of subjecting an unlisted source of fugitive emissions to substantive NSR requirements, but found no reason "to depart from its longstanding use of the SIC code and other aspects of the definition of 'source'" (id.). In the NSR context, EPA clearly considered and rejected the position that a section 302(j) rulemaking was a necessary predicate to application of collocation procedures.

As noted above, EPA has found no convincing reason to depart from its longstanding approach under NSR in defining major source for purposes of title V. The EPA accordingly affirms is original interpretation of the collocation procedures as applied to unlisted sources of fugitive emissions.

The EPA's consideration of the title V collocation provisions is explained in detail in a June 2, 1995 guidance document entitled, "EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting." The EPA would like to clarify that unlisted sources of fugitive emissions which become subject to part 70 as a result of this final rulemaking will have 12 months from the effective date of this rule to file a part 70 permit application. As always, however, once sources become subject to part 70 permitting requirements, permitting authorities can request that applications be submitted prior to the 12-month deadline.

5. Research and Development Facilities

In August 1995, EPA proposed to allow States to separate R&D activities from other sources at the same site (i.e., "collocated" sources) when determining whether the collocated

source is a major source for part 70 permitting purposes. This separate treatment applied only to R&D activities located with other sources, such as manufacturing facilities, rather than at "stand-alone" R&D activities. (Stand-alone R&D activities are sources where the primary activity is R&D and other sources at the site exist solely to support the R&D activity.) The proposal required such separately treated R&D activities to obtain permits if they would be a major source or a nonmajor source that is otherwise required to obtain a part 70 permit. Since most separately treated R&D activities would be nonmajor sources not otherwise required to obtain part 70 permits, the practical outcome of the proposal would have been to exempt most R&D activities from part 70 permitting requirements. Today's revisions to part 70 retain this separate major source treatment for R&D activities.

The August 1995 proposal defined "R&D activities" to include R&D and laboratory facilities conducting research and development into new processes and products. Under the proposed definition, an R&D activity could not manufacture products for sale or exchange except in a de minimis manner. The proposal solicited comment on whether the definition of R&D activity should include pilot plants and laboratories not engaged in R&D and on whether EPA should define de minimis within the R&D definition. In addition, the proposal solicited comment on whether EPA should allow States to treat stand-alone R&D activities separately from their support facilities, such as boilers, during major source determinations.

The revised part 70 retains separate treatment for R&D activities but several revisions have been made to the definitions of "major source" and "R&D activities." (These changes are discussed in detail below.) This preamble also explains that individual States have substantial flexibility to implement these provisions and that today's revisions to part 70 allow them: (1) To define what constitutes de minimis within the definition of research and development activities; (2) to

determine if pilot plants and R&D activities at educational institutions can be treated separately; and (3) to develop and implement State-specific procedures for calculating potential to emit (PTE) for R&D activities. In addition, the revised part 70 does not allow non-R&D laboratories to be treated in the same way as R&D activities, R&D activities to be exempt from PTE calculation requirements, or support facilities of stand-alone R&D facilities to be treated separately from the R&D activities. (These issues are also discussed in detail below.)

Separate Treatment Under Section 302 and Part D of Title I. The source aggregation procedures required in the proposed definitions of major source for the purposes of section 302 and Part D of title I of the Act (for criteria pollutants and other non-HAP pollutants) were consistent with source aggregation procedures used traditionally in the PSD and NSR programs (parts 51 and 52). The proposal discussed separate treatment for R&D activities in the context of these traditional source aggregation procedures. Traditionally, a stationary source located on contiguous or adjacent property and under common control with another source would be aggregated with the other source if both sources are in the same 2-digit SIC code. If in different 2-digit SIC codes, the sources would still be aggregated if one source is a support facility for the other source.

The EPA explained in the preamble for its August 1995 proposal that R&D activities could be treated as a separate source for part 70 permitting purposes if the R&D activity is not functionally integrated with the other collocated sources. The preamble explained that separate treatment could occur for R&D activities under traditional procedures for source grouping, but that several changes to the regulations were necessary for separate treatment to occur more frequently.

To group R&D activities separately, consistent with longstanding NSR policy, EPA proposed changes to the part 70 definition of major source to allow States to treat R&D activities as if they belong to a separate 2-digit SIC code.

This was necessary because the SIC code manual treats R&D activities located with other sources, in some cases, as belonging to the same 4-digit code and, in other cases, as belonging to a separate 2-digit code. The EPA believes, however, that typical R&D activities are not functionally integrated with collocated industrial facilities, even when they could be assigned the same 4-digit code.

In addition, consistent with longstanding NSR policy, EPA stated in the preamble that it presumed R&D activities are not normally support facilities for collocated industrial facilities. As the preamble stated, R&D activities provide conceptual, rather than material, support to collocated industrial activities. The preamble explained that conceptual support provides ideas or information that is potentially useful for a commercial production process, while material support provides real products or raw materials to a commercial industrial process. To limit separate treatment for R&D activities that provide substantial material support to other collocated industrial processes, EPA stated that activities that resemble R&D but "contribute to the product produced or services rendered by the collocated sources in more than a de minimis manner" should be treated as support facilities and considered part of the collocated source.

Most commenters supported EPA's proposal to allow separate major source treatment for R&D activities located with other sources, such as industrial facilities. Commenters agreed with EPA that R&D activities do not normally support commercial production in a material manner. The majority of commenters stated that the policy reasons for allowing this type of treatment are compelling: emissions of R&D activities are unpredictable but low, emissions are difficult and costly to estimate, and few applicable requirements typically apply.

In view of the support by commenters and of the Agency's continuing conviction that R&D activities are unique in providing conceptual support to other activities, the revised part 70 allows R&D activities to be treated separately from other types

of collocated sources. The EPA believes this position is warranted for the reasons explained in the August 1995 proposal.

Separate Treatment Under Section 112. In its August 1995 notice, EPA proposed to let States consider R&D activities separate from other collocated industrial sources during major source determinations under section 112, provided the R&D activities did "not contribute to the products produced or service rendered by the collocated sources in more than a de minimis manner." In the preamble, EPA justified separate treatment for R&D activities for section 112 major source purposes on the grounds that the statutory language of section 112(a)(1), which refers to "any stationary source or group or stationary sources," leaves EPA discretion to separate out discrete groups of stationary sources that are located together only for administrative convenience, rather than because they contribute to other activities at the site. Thus, the proposal allowed separate treatment for R&D activities during section 112 major source determinations after an administrative convenience test, rather than a support facility test.

Commenters generally supported the proposal, as they did for purposes of section 302 and part D of title I. In addition, commenters asked that EPA delete the de minimis language in the section 112 major source definition, stating that it is redundant with similar language in the definition of R&D activity.

In response to comments, EPA has retained its proposal to allow separate major source treatment for nonmajor R&D activities during major source determinations under section 112. The Agency also agrees with commenters that the R&D activities definition should contain all necessary restrictions on separate treatment. Accordingly, EPA is deleting the language it used to impose the administrative convenience test, for the purposes of section 112, in proposed paragraph (1)(i)(B) of the major source definition and, instead, has added equivalent language to the definition of R&D activities.

Except for R&D activities, the final part 70 definition is

consistent with part 63 in that all HAP sources are grouped together at a site. In its August 1995 proposal, EPA stated that parallel revisions would also be made to part 63 to allow R&D activities to be treated separately for MACT applicability purposes. The Agency has reconsidered that statement. In light of the decision in NMA vs. EPA, 59 F.3d 1351 (D.C. Cir. 1995), the Agency now believes that revisions to part 63 would not further the goals and objectives of the part 63 program. In NMA, the court agreed that the Agency was not bound to a common definition of major source in the title V and section 112 programs. At the time of that decision, part 70 required States to group together sources in the same 2-digit SIC code if the sources were adjacent or contiguous and under common control. This requirement applied to all major source determinations under part 70, including those for section 112 purposes. The part 63 general provisions, however, required the grouping of all sources at a site, regardless of SIC code.

The petitioners in NMA argued that the major source definitions for part 70 and part 63 should be identical with respect to section 112. They also contended that the part 70 definition was the proper interpretation of the Act, and that part 63 should be revised to track part 70. The Court rejected those arguments and upheld EPA's position that for MACT standards Congress intended the term "major source" to include entire plant sites, without subdivision into SIC codes. The court also said that the part 70 and part 63 major source definitions could be different if EPA believed different definitions would further the goals and objectives of each program.

The EPA believes that its policy allowing different treatment for R&D activities in the part 70 and part 63 programs is appropriate because it furthers the goals and objectives of each program. The goal of section 112 is to impose strict regulatory air pollution control requirements on major sources of HAP to achieve the maximum degree of reduction in emissions that EPA deems achievable. These control requirements, MACT

standards, as well as the major source definition used for these purposes, are established by rulemaking under part 63. The degree to which HAP emissions will be reduced depends, in part, on the number of sources that will be major sources under part 63. Therefore, disaggregating R&D activities from other sources at a site for purposes of part 63 could conceivably result in fewer major sources of HAP being subject to MACT standards. Consequently, the Agency is reluctant to allow separation of R&D activities from other sources when determining whether a group of sources is a major source of HAP under part 63. On the other hand, the objective of title V is to issue permits that ensure compliance with existing air pollution control requirements, such as MACT. The EPA believes subjecting R&D activities to title V permitting would do little to ensure compliance with control requirements because EPA is not aware of any existing substantive control requirements, such as MACT standards, that apply to R&D activities. Although all rulemakings necessary to establish MACT standards have not been completed at this time, several final rulemakings establishing MACT standards for source categories that might have R&D activities collocated with them have specifically exempted R&D activities from the standard. In addition, making the source aggregation procedures for R&D activities in the part 70 program the same of all major source determinations, whether for the purposes of section 112, section 302, or part D of title I, ensures that R&D activities are grouped consistently under part 70 regardless of the type of air pollutants being considered.

Since EPA requires R&D activities that are major sources under part 70 to obtain part 70 permits, EPA believes the revised part 70 is consistent with the requirement of section 502(2)(a) of the Act for all major sources to obtain operating permits. However, because major source is now defined differently under part 63 and part 70 for R&D activities, EPA acknowledges the potential for States to be confused. The confusion arises from

the concern that a site with both R&D and manufacturing activities could be major for HAP under part 63 solely when emissions from the R&D activities are included, while the same group of sources would not be major for HAP under part 70 when the R&D emissions are not included. The effect of such a situation would be that a source that is subject to a MACT standard for major sources under part 63 would not be a major source under part 70, and thus, not required to obtain a part 70 permit. For two reasons, EPA believes that the number of sites where such a situation could occur will be limited. First, the definitions of major source in part 63 and in part 70 with respect to section 112 are different solely in how they group R&D activities with other collocated sources. They group all other sources, as well as stand-alone R&D activities, identically. Second, the Agency is not aware of any sources that actually would be major when counting HAP emissions from R&D activities but nonmajor when HAP emissions from R&D activities are not counted. The Agency believes that if such sites exist, any detrimental effects on compliance assurance will be limited. Part 70 permits are not the only tools available to assure compliance with MACT standards. For example, under the Act, MACT standards may impose compliance assurance requirements, such as monitoring, recordkeeping, and reporting requirements, and these requirements are enforceable by EPA and the States independent of part 70 permits.

Definition of R&D Activity. The August 1995 proposed definition covered two types of R&D activities: (1) testing activities, and (2) research or laboratory facility activities. "Testing activities" meant the testing of more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided no products were produced for sale or exchange. "Research or laboratory facility activities" meant activities whose primary purpose was research and development into new processes and products. The proposed definition required those activities to be supervised by

technically trained personnel and not engaged in "the manufacture of products for sale or exchange for commercial profit, except in a de minimis manner." (Emphasis added). The "research or laboratory facilities" part of the proposed definition paralleled similar language in the definition of "research or laboratory facility" of section 112(c)(7) of the Act.

Extensive comment was received on the proposed definition of R&D activities. Commenters pointed out various contradictions or inconsistencies. They also suggested adding activities to the definition, and asked that the definition be simplified or clarified in several areas. Two State agencies were concerned that the definition could allow manufacturing facilities minimally engaged in R&D to exempt some of their production from major source determinations. Other commenters were concerned that the proposed definition seemed not to apply to: (1) Testing of new production processes and products or testing resulting in de minimis production of products; and (2) R&D for improving existing processes and products or for theoretical (basic) research.

The EPA agrees with commenters who pointed out inconsistencies between the testing and research or laboratory facilities parts of the proposed definition. In response, EPA has deleted the part of the definition referring to testing activities. That part of the proposed definition would have allowed testing activities not related to the primary purpose of research and development, such as quality assurance or quality control testing conducted during the normal course of manufacturing, to be eligible for separate major source treatment. Under the revised part 70, R&D activities must have as their primary purpose either theoretical research or research and development into new or improved processes and products. This revision does not eliminate all testing activities from eligibility for separate treatment, as testing conducted in the course of research and development could potentially meet the definition of R&D activities.

The Agency also agrees that the definition of R&D activities should include theoretical research and research and development on existing, as well as new, processes and products. Consequently, EPA is adding theoretical research and research and development to improve existing processes and products to the definition.

In response to comments, the final definition of R&D activities contains all language necessary to limit the circumstances under which R&D activities may qualify for separate major source treatment. The proposal imposed several limitations on separate treatment for R&D activities within the definition of major source: a support activity test, for section 302 and part D major source purposes; and an administrative convenience test, for section 112 major source purposes. In the proposal, these limitations were found in different sections of the definition of major source and were written with different wording. Today's part 70 revisions impose these limitations by using the same language in the definition of R&D activities. This language requires that R&D activities not contribute to the commercial production activities of collocated sources to more than a de minimis extent. The EPA believes that placing all eligibility limitations within the R&D activities definition will clarify part 70 and ease its implementation. Also, using the same language to impose the administrative convenience and support facility tests results in consistent source aggregation, whether HAP or criteria pollutants are being considered.

The final definition also retains the proposed requirement that R&D activities, by themselves, not engage in commercial production to more than a de minimis extent. Several commenters pointed out that, regardless of whether an activity supports a collocated source or not, commercial products may be manufactured "incidentally" during research and development and that the final definition should allow such production without limit. The EPA believes, however, that incidental commercial production should be limited and that an activity is no longer "primarily engaged

in R&D" if it produces more than de minimis levels of commercial production.

The Definition of De Minimis. The proposal did not define what level of commercial production was de minimis; however, EPA solicited comment on whether it should define the term and, if so, what criteria would be appropriate.

The majority of commenters asked that the final regulations allow the States to define de minimis and that EPA remain silent. Several commenters pointed out that States have experience in making these determinations and that they are able to set common-sense criteria tailored to their own programs, taking into account the mix of sources that exists in the State. In addition, they pointed out that national criteria are likely to disrupt State programs that already have established criteria. Other commenters asked EPA to define de minimis to minimize debate over its meaning.

The EPA agrees with comments suggesting that part 70 not define de minimis. Rather, part 70 allows States to interpret its meaning. The Agency believes this policy provides each State the flexibility to interpret this term based on the circumstances within that State.

However, each State should establish objective criteria to determine de minimis commercial production thresholds for R&D activities. The EPA believes criteria are needed to measure both the amount of support an R&D activity provides to other collocated sources and to measure the amount of commercial production generated solely by the R&D activity. States may use various criteria to achieve this purpose. For example, to measure the amount of commercial production from the R&D activity itself, the criteria may limit the percentage of time during which an R&D activity performs manufacturing activities or set dollar, volume, weight, or other values. To measure the level of support provided to other collocated sources, the criteria may include limits on the total percentage of products from a site that are produced by the R&D activity. For example, such

percentages may be calculated based on dollar, volume, weight, or other values.

R&D Activities at Educational Facilities. Several commenters expressed concern that the proposal would not allow disaggregation of R&D activities from collocated educational institutions, such as universities. They believe that R&D activities at universities are similar to R&D activities at manufacturing plants in terms of predictability of operations, and should be treated similarly.

In the August 1995 proposal, EPA did not discuss whether R&D activities at educational institutions would meet the R&D definition. In fact, the proposal presented several obstacles to such an interpretation. For one, the proposed definition of R&D activity covered research and development into new, but not existing, processes and products. For another, the definition did not cover theoretical research. Both of these activities typically occur at university R&D facilities. In addition, the proposed major source definition under paragraph (1)(i)(B), which imposed an administrative convenience test for section 112 purposes, was interpreted by commenters as being an obstacle to separate treatment for R&D at universities. The administrative convenience test stated that R&D activities need not be aggregated with other sources unless the R&D activities "contribute to the product produced or services rendered by the collocated sources in a more than de minimis manner." (Emphasis added.) This language appeared to be an obstacle because universities provide a service (education) to which R&D at universities may be considered to contribute in more than a de minimis manner. Thus, a literal reading of the proposed definition would have excluded R&D at educational institutions.

In view of these comments, EPA has developed final revisions to part 70 that it believes are amenable to an interpretation that allows States to treat R&D activities separately from the educational institutions at which they are located. The revised definition includes activities that typically occur at university

R&D facilities, such as basic research, and research and development of new or existing products and processes. Also, the "services rendered" language of proposed paragraph (1)(i)(B) has been revised and moved to the definition of R&D activity (for reasons explained in previous sections). States may interpret this revision to allow nonmajor R&D activities to be treated separately from collocated educational institutions. At the same time, EPA believes that the definition of R&D activities is broad enough to allow States to group university R&D facilities together with collocated educational institutions for major source purposes under part 70.

Treatment of Pilot Plants. The August 1995 proposal stated that "[p]ilot plants often present instances of activities that are conducted on a trial basis, but which are nevertheless dedicated to producing a product for commerce to more than a de minimis extent, and so would not be considered R&D."

Pharmaceutical and chemical companies commenting on the proposal asked that EPA reconsider this statement, pointing out that some pilot plants would qualify under the proposed definition of R&D activity. They also urged EPA to allow States to determine whether pilot plants meet the definition.

The EPA has reconsidered the statement it made in the proposal concerning pilot plants. The Agency agrees that States should be allowed to decide if a particular pilot plant is an R&D activity. Thus, under the revised part 70, a pilot plant may be considered R&D if a State determines it meets the definition of R&D activity. Each State may make this determination case-by-case. This clarification is appropriate because the term "pilot plant" means different things to different industries and different States. For example, some pilot plants, as integral parts of large R&D facilities, test new products or production processes during the development phase of research and development. On the other hand, as commenters pointed out, in some industries a pilot plant is a small-scale manufacturing plant constructed for the purpose of producing the first goods

for a new or test market. As a general rule, the former example could qualify because it is primarily engaged in R&D, while the latter could not, because it is primarily engaged in manufacturing. In the former example, the decision as to whether the pilot plant is primarily engaged in R&D may depend on whether it produces commercial products in more than a de minimis manner. The facts of a particular case will typically govern the decision.

Treatment of Non-R&D Laboratories. The proposal only allowed laboratories that were part of an R&D activity, and therefore "primarily engaged in research and development," to be treated separately from other collocated sources during major source determinations. The EPA solicited comment on whether the definition of R&D activities should include laboratories not engaged in R&D. In addition, the Agency asked for comment on specific categories of laboratories that are not predictable in operation and not functionally integrated with on-site industrial activities.

Many industry commenters supported extending separate major source treatment for all laboratories, although they acknowledged that the operation of certain types of laboratories can be predictable. These commenters also asked that States, rather than EPA, be allowed to make case-by-case decisions as to which non-R&D laboratories would receive separate treatment. State commenters were split on this issue, with some supporting and some opposing separate treatment for non-R&D laboratories. State commenters opposing separate treatment argued that the activities of industrial or commercial laboratories are often predictable. Another State commenter suggested that a decision on this point could not be made without more data on predictability, functional integration, or environmental impacts for various types of laboratories. The State commenter requested that EPA perform further study before deciding whether to include sources other than R&D activities. Other commenters requested separate treatment for teaching laboratories and medical/health

laboratories not engaged in R&D. These commenters argued that teaching and medical/health laboratories are not functionally integrated with on-site industrial activities and are unpredictable in operation and emissions.

Commenters did not provide enough evidence for EPA to conclude that all or even certain types of non-R&D laboratories are appropriate for separate treatment. For activities where R&D is the primary activity, EPA can clearly say that laboratories that support the R&D activity would be included under the R&D definition. However, laboratories that support many non-R&D activities, in EPA's view, tend to be functionally integrated with those activities and more predictable than not in their operations and emissions. Consequently, those non-R&D laboratories should not be disaggregated from the activities that they support. For example, several commenters asked that quality assurance/quality control laboratories be treated the same way as R&D activities. The EPA believes that such treatment would be inappropriate, because these laboratories are often dedicated components of a manufacturing source. As such, they should be treated as part of that source.

The revised part 70 will also not allow separate treatment for teaching laboratories at educational institutions. In the Agency's view, these laboratories are engaged in the primary activity of education, rather than research and development. As a result, EPA believes they are functionally integrated with the university and that their operations and emissions are predictable. Thus, EPA believes they are dissimilar to R&D activities, and should not be treated similarly.

The EPA also disagrees with comments that all analytical or medical research laboratories should be included in the definition of R&D activity. For the reasons stated previously, where laboratories are functionally integrated with other sources, EPA believes they should be part of those sources. Conversely, where laboratories are primarily engaged in theoretical research or R&D into new or existing processes or

products, and meet the other requirements of the final definition, the laboratories could be considered R&D activities.

In response to commenters' concerns that laboratories should be treated in a less rigorous way in part 70 permitting, EPA notes that its guidance, the "White Paper for Streamlined Development of Part 70 Permit Applications" (July 10, 1995), summarizes how laboratories may be treated in a streamlined manner in permit applications and permits. Although not exempting laboratories from permitting altogether, this guidance allows most laboratory activities to be treated as trivial or insignificant activities. This means, for most laboratories, that permit applications are not required to contain extensive emissions inventories and permits may contain streamlined compliance certification and monitoring requirements.

In summary, part 70 has not been revised to explicitly allow disaggregation of non-R&D laboratories; however, States may determine if any particular laboratories qualify for disaggregation under the definition of R&D activities.

Calculation of Potential to Emit. The proposal asked for comment on whether EPA should provide a de minimis exemption from the requirement to calculate PTE for R&D activities, including stand-alone R&D activities and R&D activities collocated with other sources. Comment was also requested on cost-effective means of calculating PTE for R&D activities. Comments by industry representatives suggested that EPA exempt R&D activities from PTE calculation altogether. They pointed out that, since R&D operations and emissions are highly variable and noncontinuous, calculation of PTE would be expensive and the results highly speculative. Representatives of various types of laboratories asked for a similar exemption. One commenter representing an organization of State permitting agencies thought such an exemption was inappropriate because it would make the determination of whether an R&D activity is a major source an impossible task, since there would be no basis for making the determination. Several commenters asked that States, rather than

EPA, take the lead in developing simple procedures for calculating PTE at R&D activities. Only one commenter offered an example of how PTE could be calculated cost-effectively (although no data on cost effectiveness was presented), suggesting that it be based on an annual projected emission inventory.

The Agency is not persuaded by commenters that an exemption to PTE calculations is appropriate. While calculation of PTE for R&D activities may be difficult, it is still possible, and has been successfully done in a number of cases. If EPA were to create a national exemption from PTE calculation for R&D activities, States would be unable to require PTE calculations even where the calculations are possible and the States believe the calculations are necessary. Therefore, EPA believes the best policy is not to allow a de minimis exemption from calculating PTE for R&D activities, while allowing State permitting authorities the discretion to develop and implement State-specific, streamlined methods for determining PTE for R&D activities.

Treatment of Stand-alone R&D Activities. The August 1995 proposal solicited comment on allowing stand-alone R&D activities to be treated separately from their support facilities, when those support facilities would independently be major sources. Many commenters supported such a position. They argued this was appropriate because: (1) support facilities are collocated with R&D activities mainly for administrative convenience; and (2) this additional flexibility would be a further refinement of the overall goal of separating out R&D activities during major source determinations. However, one State agency argued that this policy would potentially erode the concept of a source as the sum of its functionally-integrated parts.

The Agency agrees with the State commenter that the integrity of a source must be preserved. To separate a source from its support activities would undermine the traditional concept of a source as the sum of its functionally-integrated parts. The EPA believes that such support facilities are not

generally collocated with R&D activities merely for administrative convenience, but rather for material necessity, and that they are functionally integrated with the R&D activities. The EPA does not agree that separation of support facilities would be a further refinement of its policy for R&D activities, since the policy for R&D activities is based on the theory that R&D activities are not functionally integrated with other collocated non-R&D sources and are located with these other sources merely for administrative convenience. Consequently, the revised part 70 does not allow the support facilities of stand-alone R&D activities to be treated separately from R&D activities during major source determinations.

G. Permit Revision/Permit Modification

The EPA proposed in the August 1994 notice to change the definition of "permit revision" and to remove the definition of "permit modification" from part 70 to make the terminology consistent with the revised permit revision procedures proposed in the August 1994 notice. In the August 1995 notice, EPA again proposed to revise the permit revision system, but did not propose specific corresponding changes to the definitions of permit revision or permit modification. Commenters suggested that these terms be clarified.

The EPA has evaluated the two definitions in light of the permit revision procedures being promulgated today. The EPA believes that permit modification no longer has meaning distinct from permit revision and is therefore deleting it from part 70. The term "permit revision" is being further clarified to encompass the changes to a permit that could be made under any of the permit revision tracks set forth in § 70.7. This includes situations where a permit revision is required pursuant to § 70.7(d)(1)[7] as well as those which can be initiated by the

[7]These include: (1) notice-only permit revisions under § 70.7(e)(2); (2) de minimis permit revisions under § 70.7(e)(3); minor permit revisions under § 70.7(f), and significant permit revisions under § 70.7(g).

source or permitting authority pursuant to the administrative permit amendment provisions of § 70.7(e)(1).

The EPA expects that the majority of permit revisions will be those which are required as a result of changes at a source. The basic statement as to when permit revisions are required is found in § 70.7(d). It states that a change requires a permit revision if it: (1) could not be operated without violating an existing permit term; or (2) renders the source subject to an applicable requirement to which the source has not been previously subject. This requirement follows naturally from the discussion of off-permit changes, contained in section V.D. of this preamble, which states that, in the Agency's view the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement.

Nonetheless, as originally noted in the 1994 proposal (59 FR 44464), and clarified in 1995 (60 FR 45533), the definition of permit revision should not be read so broadly as to encompass all changes at a facility that have applicable requirements governing them. In many cases, changes can be made which, despite the fact that they involve emissions units subject to applicable Act requirements, can be operated without a permit revision. For example, generally applicable requirements (e.g., opacity limits) can be treated generally in part 70 permits such that emissions units may be added or modified without triggering either of the requirements in § 70.7(d)(1). Similarly, as discussed in section III.A. of this preamble, advance approvals may be designed such that the change already complies with the applicable requirement(s), and so does not trigger § 70.7(d)(1).

H. Plantwide Applicability Limit

The EPA proposed in August 1995 to add to § 70.2 a definition of the term "plantwide applicability limit (PAL)." This term was referenced within the definition of the term "emissions cap permit," which noted that such a permit includes a

PAL and/or an advance NSR condition. The PAL definition indicated that a PAL was a federally-enforceable limit established to limit a source's PTE to a level at or below which a particular requirement would not apply.

While commenters were generally supportive of the concept of applicability limits, they raised a number of concerns about the proposed definition of PAL. For example, two industry commenters suggested that applicability limits in part 70 permits need not always be plantwide; limits that only cover a portion of a plant should be available as well. Two additional industry commenters were unclear about the relationship between a PAL as defined in part 70 and the PAL concept recently developed for use in the major NSR program, and raised concerns that, if future NSR regulations address PALs, there could be inconsistencies between the NSR and part 70 approaches to PALs, including whether PALs are mandatory program elements. In addition, a State commenter was concerned about the use of the term "potential emissions" in the PAL definition. The commenter noted that limitations on PTE are intended to limit actual emissions, not merely to limit PTE irrespective of what is actually emitted.

After considering these comments, and in light of two additional factors, EPA has decided not to promulgate a definition of the term PAL in today's regulatory changes. The first additional factor EPA considered is the Agency's proposal to significantly revise the PSD and NSR regulations in parts 51 and 52 (July 23, 1996, 61 FR 38249). Among other things, this proposal would add a definition of the term PAL, and would include provisions for the use of PALs to determine whether a major modification has occurred at an existing NSR major source. Although NSR permits containing major NSR PALs have been issued under current EPA regulations, EPA proposed to clarify a number of relevant issues regarding the establishment and adjustment of PALs. To harmonize the implementation of NSR and operating permit programs, and to minimize confusion, EPA believes that the definition of the term PAL should be consistent in both programs.

Therefore, EPA believes it should defer to the definition of PAL that will be promulgated in the final NSR reform regulations. The analysis of comments on the proposed NSR regulations will provide an appropriate forum for considering the full range of issues related to PAL implementation, including issues raised by some part 70 commenters such as: the voluntary versus mandatory nature of PALs on the part of sources and States; the use of "potential emissions" terminology; and the options for applicability limits that do not cover the whole plant. Should a definition of PAL be needed in part 70, EPA will codify a definition consistent with that finalized in the NSR regulations in that rulemaking.

A second factor that EPA considered in deciding not to promulgate a definition of PAL is the Agency's decision not to mandate emissions cap permits that include PALs and advance NSR as a minimum element of State part 70 programs. As discussed in section V.A. of this preamble, EPA is not finalizing proposed § 70.4(b)(3)(xiv) requiring State authority to issue emissions cap permits. In addition, requiring PALs for part 70 would be inconsistent with the proposed NSR changes, which would maintain the current NSR policy that PALs are optional on the part of sources and States. The deletion of the cap requirement as embodied in the proposed § 70.4(b)(3)(xiv) renders a regulatory definition of emissions cap permit unnecessary. Since the term PAL was defined in the part 70 proposal for use in the definition of emissions cap permit, it is likewise no longer necessary for this purpose.

The EPA notes that its decision not to adopt a definition of PAL today does not in any way limit the availability of PALs at part 70 sources. Under current NSR rules and policy, PALs are presently an option available to sources and States on a voluntary basis, and several PALs have been developed under existing NSR SIP's. Any PAL developed at a part 70 source could be established in the source's part 70 permit, or could be established as an NSR permit term, in which case it would be a

part 70 applicable requirement like any other NSR permit term. The EPA also notes that its decision to use the term PAL that mirrors the major source NSR program does not in any way restrict the opportunities to use other types of caps to provide flexible approaches to determining applicability or compliance for other applicable requirements.

I. Potential to Emit

The EPA proposed in August 1994 to revise the definition of "potential to emit" in response to petitioners' comments that federally-enforceable potential to emit limits are enforceable not only by the Administrator, as stated in the original part 70, but also by citizens. However, in an unrelated development, in Clean Air Implementation Project (CAIP) vs. EPA, (D.C. Cir. June 28, 1996), the court vacated and remanded to the Agency the part 70 definition of potential to emit in response to industry challenges to the Federal enforceability requirement. The EPA, in its memorandum, "Extension of January 25, 1995 Potential to Emit Transition Policy (August 27, 1996)," stated that the term "federally enforceable" in § 70.2 should now be read to mean "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency" pending completion of new rulemaking on the federal enforceability issue.

A number of industry commenters addressed the issue of whether EPA should require limits on potential to emit to be federally enforceable, noting the inconsistency between the court's ruling in CAIP vs. EPA and the proposed and current part 70 definitions of potential to emit. As noted, the court has now vacated this definition, relying on its earlier decision in NMA vs. EPA regarding the definition of potential to emit under section 112. In the NMA decision, the court framed the issue as whether limits on potential to emit were "effective," and found that EPA had failed to justify the relationship between the Federal enforceability requirement and effective limits on potential to emit. The court did not have occasion to address the "maximum capacity to emit" concept, EPA's longstanding

policies that limits on potential to emit must be both legally and practically enforceable, or any other aspect of the definition of potential to emit. Therefore, EPA is today revising the definition in response to the court's vacatur, for the purpose of reserving judgment on the Federal enforceability requirement challenged by petitioners, pending a separate rulemaking in which EPA would reconsider the definition of potential to emit in part 70 and related rules, to address the issue of Federal enforceability and the related issue of criteria for effectiveness of limitations on potential to emit. To accommodate EPA's reservation of judgment on the Federal enforceability issue, the definition will be restructured somewhat, but will not otherwise change substantively. Thus, pending completion of a separate rulemaking, the definition of potential to emit finalized in today's rulemaking still should be read consistently with the August 27, 1996 memorandum noted above to mean limitations "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency."

Nonetheless, EPA wishes to clarify today that the decision whether to require Federal enforceability is independent of the issue of whether limits enforceable by the Administrator are also enforceable by citizens under the Act. As noted, it is clarification of this latter point that comprised the substance of the August 1994 proposal. Commenters generally objected to adding language that could restrict the types of limits that could serve to limit potential to emit, and objected to revising the definition of potential to emit while it was the subject of litigation. However, they did not speak directly to the issue of whether federally-enforceable limits are also enforceable by citizens. Therefore, EPA today is proceeding to clarify, by way of today's rulemaking and preamble, its position stated in the August 1994 proposal that limits which are enforceable by the Administrator are enforceable by citizens under section 304 of the Act. This clarification is made without prejudice to any

upcoming rulemaking on Federal enforceability.

J. Regulated Air Pollutant

The August 1995 notice proposed a change to the definition of "regulated air pollutant" to respond to concerns raised during the development of EPA rules implementing accidental release prevention requirements under section 112(r) of the Act (40 CFR part 68). The proposed change would revise the definition to delete a pollutant's listing pursuant to section 112(r) as a criterion for that pollutant being considered a regulated air pollutant. Although some 112(r) pollutants would still be regulated pollutants for other reasons, a pollutant would no longer be defined as a regulated air pollutant solely because it is listed under 112(r). As noted in the August 1995 preamble, this action would benefit part 70 implementation by removing from part 70 program requirements (e.g., the requirement to describe emissions in permit applications) a number of section 112(r) pollutants which are generally not subject to air quality management programs.

Many commenters were generally supportive of EPA's proposal, noting that requiring estimates of 112(r) emissions in determining part 70 applicability would be unreasonably burdensome. However, commenters did raise concerns about whether the proposed language clearly reflects EPA's intent. They noted that the proposed language still generally includes any section 112 pollutant, and would be read to include 112(r) pollutants unless some additional language is added to provide a specific exemption for 112(r)-only pollutants. The EPA agrees and has added language to more clearly reflect its intent. In addition, one commenter noted that paragraph (3) of the definition of "regulated pollutant (for presumptive fee calculation)," which specifically exempts 112(r)-only pollutants from regulated pollutants that must be considered in fee calculations, is unnecessary if 112(r) pollutants are no longer regulated air pollutants to begin with. The EPA agrees, and has deleted paragraph (3) from that definition.

K. Research and Development Activities

See section III.F.5. of this preamble for a discussion of the definition of research and development activities.

L. Section 502(b)(10) Changes

The EPA proposed, in August 1994, to delete provisions in § 70.4(b)(12)(i) which allow the source to unilaterally make a specific type of change, known as a "section 502(b)(10) change." Under the original part 70, this type of change could contravene an express permit term as long as the change would not violate applicable requirements, and would not contravene federally-enforceable monitoring, recordkeeping, reporting, or compliance requirements. Such changes could be made without a permit revision if the change was not a title I modification and did not exceed the emissions allowable under the permit. For reasons explained in section V.C. of this preamble, EPA is deleting the provisions in § 70.4 allowing such changes. As a result, the definition in section § 70.2 is no longer necessary and is deleted.

M. State Review Program

The August 1995 notice proposed a definition of "State review program" for purposes of implementing the proposed system for part 70 permit revisions. The proposed system divided changes into two classes; those that were subject to State review programs and those that were not. Commenters requested clarification of this term in light of the August 1995 proposal. However, the permit revision system being promulgated today (discussed in section VIII.A. of this preamble) has been restructured for clarity. The restructured part 70 no longer relies on the term "State review program." Therefore, this term is being deleted from part 70.

N. Title I Modification

The EPA proposed in August 1994 to include a definition of the term "title I modification" in response to the confusion and controversy surrounding its implementation. This term is used in the original part 70 primarily in establishing what changes were

eligible for each of the three permit revision procedures. As indicated in the original part 70, title I modifications were not eligible for the minor permit modification or administrative amendment procedures, and would thus be significant permit revisions. This term is also used in the Act in section 502(b)(10) and was in the original part 70 to exclude title I modifications from off-permit treatment, which allows certain changes without a permit revision.

The 1994 proposal stated that EPA believed that title I modifications included changes subject to State minor NSR programs approved under section 110(a)(2) of the Act. The EPA received a large number of comments from industry and States strongly opposing this interpretation. The EPA considered these comments in detail, and concluded that title I modification as it appears in section 502(b)(10) and in the original part 70 should be read to exclude changes subject to minor NSR. The rationale for this proposal is described in detail in the August 1995 proposal notice.

Comments on the 1995 proposed interpretation of title I modification were generally favorable. One environmental group incorporated by reference its earlier comments on the August 1994 proposal which supported EPA's original interpretation that title I modifications include minor NSR. However, this commenter did not raise any new issues regarding the position EPA took in its August 1995 proposal. Therefore, EPA stands by the proposal and rationale as set forth in the August 1995 notice.

Furthermore, EPA notes that the revised permit revision system being promulgated today greatly diminishes the importance of the term title I modification. Whereas the term is used in the original part 70 to govern which changes are eligible for streamlined permit revision procedures, EPA notes that the availability of today's new streamlined revision procedures do not depend on whether the change is a title I modification. Similarly, EPA is deleting the off-permit procedures, which had relied upon the meaning of title I modification. The remaining

reference to the term in part 70 states that changes made pursuant to section 502(b)(10) cannot be title I modifications. Although the meaning of title I modification is now of greatly reduced significance in part 70, EPA sees no reason not to promulgate the definition as proposed in August 1995.

Noting that current part 70 does not contain a definition of title I modification, EPA wishes to today reiterate its position on the interpretation of this term for current part 70 programs until such time as they are revised pursuant to today's revisions. As Stated on November 7, 1995[8], EPA believes that the interpretation of the current part 70 rule is consistent with that in the August 1995 proposal, i.e., that title I modifications do not include minor NSR changes.

IV. Changes to Section 70.3

A. Part C and D Sources

In the August 1994 notice, EPA proposed to add a new paragraph to § 70.3(a) to conform to section 502(a) of the Act, which lists the types of sources required to obtain a part 70 permit. This list includes "any other source required to have a permit under parts C and D of title I." Parts C and D of title I constitute the major NSR permitting programs. Three State and two industry commenters felt that the proposed change was unnecessary because major sources are already subject to part 70 because of existing § 70.3(a)(1). They felt that the additional language could add confusion. In particular, they were concerned that there is the possibility of confusing minor source NSR (though not in parts C or D) with part C or D NSR such that large numbers of those sources might unintentionally be brought into the part 70 permitting program.

The EPA wishes to clarify that the proposed change was not meant to refer to minor NSR sources, but only to sources that parts C and D of title I would require to have a permit.

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[8]See the November 7, 1995 letter from Lydia Wegman, Deputy Director, OAQPS to William Becker, Executive Director, STAPPA/ALAPCO.

However, EPA notes that certain sources that might in some respects be viewed as non-major are still sources "required to have a permit under parts C or D of title I." The EPA is aware of at least two ways that an NSR source which is not brought into part 70 by the major source size cutoffs in § 70.3(a)(1) could still be subject to proposed § 70.3(a)(4) 70 because it receives a part C or D permit: (1) a source was subject to major source NSR permitting when constructed or modified, but has since reduced its emissions to non-major levels though it remains subject to its NSR permit; or (2) a source is major for NSR but otherwise viewed as nonmajor for part 70 under a part 70 policy decision (e.g., the changed part 70 applicability criterion with respect to considering only "PM-10," rather than "particulate matter" in determining "major source" status[9]). The proposed change would apply to the minor sources described above, and may apply to other circumstances of which the Agency is not yet aware.

Considering the comments, EPA maintains that the proposed change, with the above clarification, best implements section 502(a) of the Act. The EPA believes that section 502(a) offers no basis to exclude such sources from part 70. Moreover, EPA believes that the proposed change will improve NSR and part 70 implementation, and will make the interface between NSR and part 70 more straightforward. Therefore § 70.3(a)(4) is being finalized as proposed.

B. Section 112(r) Applicability

The EPA proposed in August 1994 to provide that, where a source would be classified as major solely because of its emissions of 112(r)-only pollutants, that source would not be subject to the stipulation that all major sources must obtain part 70 permits. This provision is needed to conform to section 112(r)(7)(F) of the Act. All the commenters on this issue

[9]This policy is described in the October 16, 1995 memorandum from Lydia Wegman entitled "Definition of Regulated Pollutant for Particulate Matter for Purposes of Title V."

supported EPA's proposal to add this provision. However, EPA notes that the proposed language for § 70.3(a)(1) could be read to exempt sources that are major for any 112(r) pollutant, even those regulated elsewhere in the Act (e.g., HAPs listed in section 112(b)). The EPA intended for this exception to apply only to those pollutants listed solely pursuant to 112(r). Therefore, EPA is finalizing proposed language with the clarification that this applicability exception applies to 112(r)-only permits. The EPA believes that this change, together with the other 112(r) changes and clarifications in today's part 70 revisions, clarify the 112(r)/part 70 interface with respect to applicability, permit application, and permit content requirements.

V. Changes to Section 70.4

A. Authority to Issue Emissions Cap Permits and Advance NSR

The EPA proposed in August 1995 to specifically require, as a minimum program element, that a State demonstrate (through a legal opinion) authority to issue permits containing emissions caps and advance NSR conditions consistent with all applicable requirements. Two provisions, § 70.4(b)(3)(xiv) and § 70.4(b)(12)(i), together describe the part 70 program requirements that permitting authorities must meet with respect to caps and advance NSR. Proposed § 70.4(b)(12)(i), discussed in detail in the next section of this preamble required that permitting authorities provide caps, and also addressed the permit content and procedural requirements for trading under these caps. Proposed § 70.4(b)(3)(xiv), on the other hand, required the additional authority to issue emissions cap permits which include advance NSR and/or PALs. Thus, § 70.4(b)(12)(i) required caps but also required the permit to assure compliance with all applicable requirements, while the proposed § 70.4(b)(3)(xiv) could be read to require permitting authorities to employ caps either to assure compliance with or to avoid triggering of applicable requirements.

Several industry commenters expressed general support for

mandatory caps and advance NSR. However, few commenters provided specific comments on the language of the proposed § 70.4(b)(3)(xiv), which embodied the specific mandate that States demonstrate authority to issue emissions cap permits that include PALs and/or advance NSR. Two industry commenters did support making PALs mandatory because it would promote the use of PALs.

One State agency representative was concerned that mandatory caps would seriously impact State minor NSR programs, many of which do not presently provide for PALs or advance NSR. This commenter also was concerned that a cap might result in less emissions reductions than would occur under current minor NSR programs. The commenter urged that emissions caps be left as an option to States. Another State commenter argued that trading under emissions caps should only be mandated where the State has a rule authorizing such an approach. An environmental group representative also opposed mandatory caps, contending that the cap concepts are relatively untried. The commenter suggested that States be allowed to test caps to determine which situations merit them, rather than have caps required by EPA. The commenter also argued that developing cap permits is more resource-intensive, and a cap mandate from EPA could stretch State resources. Several additional commenters were confused by the cap provisions and were unclear, among other things, about what sort of caps States were required to provide.

As noted below, EPA stands by its position in the original part 70 regulations and restated in the preamble to the August 1994 proposal, that trading under emissions caps is an appropriate, and even preferable, means of implementing section 502(b)(10) of the Act. After considering the comments, however, EPA has decided that the proposed § 70.4(b)(3)(xiv) is inappropriate for two reasons. First, EPA is concerned that, as proposed, this provision could have been read to require caps and advance NSR even where the caps and advance NSR are inconsistent with applicable requirements, including the procedural

requirements of the applicable SIP. Although there was some confusion about exactly what this provision would have required, EPA never intended it to require permitting authorities to issue emissions cap permits that were inconsistent with applicable requirements. However, some commenters apparently read the proposal to supersede applicable requirements, or to require the States to change them. The Agency believes that reading section 502(b)(10) in this manner would be inappropriate. In any event, this was not EPA's intent, and the Agency wishes to clarify that the permitting authority has considerable discretion to determine whether its regulations allow provisions such as advance NSR or PALs in any particular case. Second, consistent with this position, EPA believes that the proposed language is now redundant with other provisions in § 70.4(b)(3), e.g., § 70.4(b)(3)(i) and § 70.4(b)(3)(v). For these reasons, the Agency is deleting the proposed provision.

The remaining components of EPA's approach to emissions cap permits and section 502(b)(10) are discussed in the next section of this preamble. Although EPA is not codifying the proposed § 70.4(b)(3)(xiv), the Agency wishes to clarify here that it still strongly supports the advance approval and PAL/cap concepts embodied in the proposal for emissions cap permits, if they are consistent with applicable requirements and State program needs. The EPA agrees with the large number of commenters who stated that cap and advance NSR approaches could improve operational flexibility by reducing the number of NSR permits and part 70 permit revisions, which should save significant time and resources for sources and permitting authorities. For this reason, EPA encourages States to evaluate the present availability of advance NSR, PALs, and other types of caps, to consider ways to integrate these concepts into part 70 programs and/or SIP's. The Agency is adhering to the principle, however, that the States are best suited to determine whether caps or advance NSR are appropriate in their situations and EPA accepts that some States may choose not to provide these approaches or

may choose to provide flexibility through other means.

B. Trading Under Permitted Emissions Caps

In the preamble to the August 1994 proposal, EPA stated that sources should be able to establish an emissions cap and to comply with that cap through trading, as an appropriate means of implementing section 502(b)(10) of the Act. Both the August 1994 and August 1995 notices proposed to modify the current part 70 requirements for trading under emissions caps to clarify the cap provision in § 70.4(b)(12) and address State and industry concerns.

A number of commenters generally supported EPA's efforts to promote the use of emissions caps and to provide for their incorporation into part 70 permits. Several industry commenters expressed general support for mandatory caps and one felt that mandatory caps are clearly required by Statute. In contrast, a number of State commenters urged EPA to clarify that applicable requirements continue to apply under any cap established under section 502(b)(10).

The EPA agrees with comments by State agencies that emissions caps must still meet all applicable requirements, and the Agency hereby clarifies that section 502(b)(10) does not mandate broad emissions caps that would conflict with or supersede applicable requirements. As stated in § 70.4(b)(12), the permitting authority must include terms and conditions in each part 70 permit that assure compliance with all applicable requirements. Thus, where the permitting authority determines that a source's emissions cap proposal does not assure compliance with all applicable requirements, the permitting authority must include additional provisions as necessary to do so. For example, were a source to propose a cap for the purpose of allowing preapproval of minor NSR without case-by-case review, but the permitting authority has determined that it cannot or should not waive case-by-case review under its SIP, the permitting authority would be obligated to disapprove the proposed preapproval conditions. The § 70.4(b)(12) requirement

should not be read to require the permitting authority to issue such a cap proposal. While the permittee may always propose a cap in the part 70 permit that it believes will meet applicable requirements, the permitting authority has the final authority to determine whether the cap meets that purpose and whether the permit includes the necessary applicable requirements.

To avoid the situation where the cap proposed by the source with the intent of satisfying an applicable requirement fails to meet the expectations of the permitting authority, EPA encourages sources to communicate early with permitting authorities when developing emissions caps so that the source can clearly understand State policies on the use of caps to meet applicable requirements, and can develop applications for caps that meet the source's needs while still assuring compliance with all applicable requirements. In addition, even if caps and minor NSR preapprovals are consistent with State program requirements, the permitting authority must still assure that a proposed emissions cap is enforceable as a practical matter, and must reject any cap proposal that it determines is not practically enforceable. Therefore, it is essential that sources and permitting authorities communicate clearly regarding the enforceability of caps as they are developed.

The EPA wishes to further clarify, in response to comments, that caps by themselves do not necessarily avoid all permit revisions, since changes under a cap may still trigger other applicable requirements (e.g., a cap designed to avoid major NSR will not necessarily protect a source from the need to comply with minor NSR or section 112 requirements), which in turn will trigger the need for a permit revision. Sources and permitting authorities seeking to design flexible permits must consider the source's particular set of applicable requirements, including requirements that will apply to changes anticipated under the cap, and assess which of several flexibility approaches (e.g., emissions caps, emissions averaging, applicability limits, advance approvals, etc.) provide the most appropriate degree of

flexibility. Sources with complicated sets of applicable requirements may find that several caps and/or advance approvals addressing different emission unit-applicable requirement combinations afford the source the greatest flexibility. For example, the previously discussed permit for an Intel semiconductor facility in Oregon includes, among other things, a major NSR applicability limit (similar to a PAL), a combination cap/preapproval for minor NSR, and a bubble-type limit for RACT at certain emissions units.

In August 1995, EPA also proposed to allow a one-time advance notification of a facility's anticipated changes under a cap during the term of the permit to comply with the 7-day notification requirement of section 502(b)(10). A number of industry commenters supported this proposal. They contended that a 7-day advance notification prior to each change under the cap did little to increase the assurance that the source was complying with the cap, but added significant reporting burdens, which according to some commenters, would render the cap unworkable, especially for companies that make many frequent changes. While EPA is sympathetic to any burden imposed by the notice, the Agency has determined that section 502(b)(10) cannot be read to allow a waiver of the 7-day advance notification for individual changes under a cap, and that providing for one-time only notification would constitute such a waiver. Where trading occurs under an emissions cap established pursuant to section 502(b)(10), the Act requires a 7-day advance notification for each change under that cap. Consequently, the proposed language allowing one-time notification is not included in today's part 70 revisions.

However, as stated in the August 1995 preamble, EPA believes section 502(b)(10) was not intended to restrict any flexibility already available under the regulations governing applicable requirements. Thus, permits need not rely on section 502(b)(10), and the 7-day notification period does not apply where the underlying applicable requirements lawfully provide a different

notification time frame (including no notification).

For example, if a State has granted a cap for the purposes of allowing certain minor NSR preapprovals, the State may have determined that, under its minor NSR regulations (as they may be revised to meet today's changes to part 51), no advance notification is necessary for such preapproved changes under the cap. However, section 502(b)(10) could be read to require 7-day advance notification for all changes under this cap. As noted, EPA believes that where the permitting authority issues a permit authorizing trading under a permitted emissions cap that is governed by an applicable requirement which does not require 7-day advance notification, then the section 502(b)(10) requirement for 7-day advance notification does not apply. In this case, the time period is governed by the minor NSR regulations, not by section 502(b)(10).

Flexibility in operating permits can be provided through emissions caps, advance approvals, and other flexible approaches that allow changes without a permit revision, while assuring compliance with applicable requirements. The appropriate flexibility tools for a given source/applicable requirement situation are dictated by the source's flexibility needs and by the details of each applicable requirement facing the source. Determining appropriate flexibility approaches requires both a general awareness of the available flexibility options and a specific knowledge of which options are available under the relevant applicable requirements. The EPA is aware that many State programs are working to develop flexible permits, and the Agency supports and encourages these efforts. Several Agency efforts are underway to clarify and promote flexible permit development, and EPA intends to issue policy and guidance providing more detailed information about designing flexible permits. However, in many instances caps and advance approvals are not appropriate or necessary, such as where facilities do not make frequent or significant changes. Instead of a permit with caps and advance approvals, these facilities may be better off

relying on the flexibility inherent in applicable requirements, alternative operating scenarios, or the streamlining offered by today's changes to the permit revision system.

C. Provisions for Section 502(b)(10) Changes

In August 1994, EPA proposed to delete the provision allowing section 502(b)(10) changes (§§ 70.2 and 70.4(b)(12)(i)), which, under the original part 70, allowed contravention of permit terms not necessary for compliance with applicable requirements, if the change contravening the permit term were not a title I modification and did not exceed emissions allowed under the permit, provided that a 7-day notice was given. State litigants raised implementation concerns with this provision, citing the difficulty of knowing which compliance term was or was not a section 502(b)(10) change, and the fact that the source could often make the decision without review by the permitting authority. In response to these concerns, EPA proposed to delete the provision, and require that changes which would have been section 502(b)(10) changes will now need permit revisions, including permit revisions more streamlined than section 502(b)(10)'s 7-day advance notification procedures, if the change would conflict with the existing permit or trigger a newly applicable requirement not provided for in the permit.

Several State commenters supported the proposed deletion, although one recommended that EPA allow changes without a part 70 permit revision if the changes are exempt from review under a State's NSR program. Many industry commenters opposed the deletion of the definition of section 502(b)(10) changes and the deletion of § 70.4(b)(12)(i) on the grounds that the Act clearly provides for such changes under section 502(b)(10). Several commenters objected on the grounds that the section 502(b)(10) change provision allows a source the opportunity to "clean up" a permit which was initially laden with terms that the permittee found to be unworkable or unnecessary. Some commenters suggested that without this provision, a company would need a permit revision to "switch brands of paint." Some commenters believe

that when a company changes its operations without triggering some new requirement, its permit may contain terms that restrict flexibility by requiring operation of a monitor or other apparatus that the company is no longer required to operate. They believe that sources should be able to change permit terms in such situations under section 502(b)(10), since it would require a 7-day notice alerting the State that the term was no longer being followed, and allow removal of the term from the permit without a permit revision.

For the following reasons, EPA is today deleting the provision allowing section 502(b)(10) changes that contravene express permit terms without requiring a permit revision. First, while section 502(b)(10) does allow some changes without a permit revision, other provisions of the Act clearly require that a company operate only in compliance with its permit. For example, section 502(a) reads, "After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title" (emphasis added). Permits must, in turn, assure compliance with all applicable requirements under the Act and the SIP (Sections 502(b)(5)(A), 504(a), and 505(b)(1)). In EPA's view, these statutory requirements are best met if an issued permit is complied with in whole and without exception, including all permit terms and conditions and applicable requirements. The EPA does not believe that an interpretation of section 502(b)(10) allowing violation of express permit terms is consistent with other requirements of the Act. The Agency believes that the proper way to remove permit terms which the company believes it is no longer required to meet is through a permit revision.

In response to concerns about the burden and delay of a permit revision, today's part 70 revisions provide several streamlined ways to revise a permit. If the changes are in fact "details" unrelated to federally-enforceable compliance terms, (i.e., they would have qualified as section 502(b)(10) changes

under the original part 70), they should be eligible for the de minimis permit revision process. Similarly, if the change affects the compliance monitoring contained in the permit, the change is most appropriately handled through the applicable permit revision track, not through section 502(b)(10).

Second, important objectives of title V are to improve and assure compliance with relevant applicable requirements. Any provisions ensuring operational flexibility must be consistent with these objectives. Consequently, the Agency believes that section 502(b)(10) must be read consistently with other provisions of the Act so that it does not conflict with requirements to assure compliance with the permit and its applicable requirements. Thus, the Agency disagrees with commenters who say that section 502(b)(10) must allow a company unilaterally to decide that it will not comply with its permit. In addition, EPA believes that to allow contravention of permit terms after a permit has undergone review by the permitting authority, the public, affected States, and EPA would render these review processes irrelevant. Instead, EPA believes part 70 should, as today's action does, protect the ability of the public, affected States, and EPA to review permit revisions, where such review is appropriate, and to allow permit revisions without review where the review would add little value.

Although EPA is deleting the definition of section 502(b)(10) changes and the provisions allowing for such changes as originally defined in part 70, the Agency maintains that section 502(b)(10) authorizes certain types of changes without permit revisions. These changes are discussed in section V.E. of this preamble. To avoid confusion, EPA is no longer using the term "section 502(b)(10) changes" because it may continue to be associated with the narrow definition used in the original part 70.

D. Off-Permit Changes

In the August 1995 notice, EPA proposed to delete §§ 70.4(b)(14) and (15). Section 70.4(b)(14) provided that a

State could allow a source to make a change without a permit revision, if the change was not addressed or prohibited by the existing permit, and if the change was not one of those listed in § 70.4(b)(15), i.e., a requirement under title IV or modification under title I of the Act. Changes made pursuant to § 70.4(b)(14) were called "off-permit" changes, because the permit was not revised until it was renewed, instead of at the time the change was made. Thus, the requirements to which the change was subject remained off of the permit, or off-permit, until renewal. Section 70.4(b)(15) provided that any source making an off-permit change must submit a notice at the time of the change that described the change, the change in emissions or pollutants, and the applicable requirements that would apply. Off-permit changes were not eligible for the permit shield.

The preamble to the August 1995 notice stated that the need for off-permit provisions would be greatly reduced by provisions of the proposed revisions which allow for rapid incorporation of changes that have undergone State review programs, and also by the provisions of the "notice-and-go" process. The preamble stated EPA's belief that the proposed elimination of off-permit provision would ensure that the permit is a contemporaneous and comprehensive summary of all applicable requirements, which is consistent with the statutory purpose of title V and favored by most permitting agencies.

Comments by permitting agencies were generally in favor of the proposal to eliminate the off-permit provisions, because most State and local regulatory agencies have traditionally viewed permits as allowing only those activities that are expressly stated in the permit, and as disallowing activities that are not expressly stated in the permit without a permit revision. Industry commenters favored retaining the off-permit provisions, although many of them agreed that the need for an off-permit provision should be greatly reduced if the proposed streamlined permit revision processes are adopted. Several commenters favored retaining off-permit provisions for changes that are

expressly exempt from a State's minor NSR program, since changes exempt from NSR are not relied on by the SIP for attainment or maintenance of ambient standards. In these commenters' view, the main purpose of title V is to assure compliance with the SIP. Therefore, allowing changes that are exempt from the SIP's NSR program to remain off-permit is appropriate for the purposes of title V.

One industry commenter articulated several arguments that the commenter believes compel EPA to retain the off-permit provisions. The commenter contends that title V requires only that a permit agency "have adequate authority" in its legislation to "issue permits and assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act" (section 502(b)(5)(A)). The commenter also noted that section 504(a) of the Act requires that each permit "issued" under title V must have enforceable emission limitations and standards, etc. to assure compliance with applicable requirements. The commenter believes that both of these sections are met if a part 70 permit at the time of initial issuance or renewal contains all then-applicable requirements, and the permitting agency has ample authority to ensure that it does. The commenter believes neither section requires that part 70 permits be continuously revised. In addition, the commenter contends that sections 502(b)(9) and 502(b)(10) of the Act both reflect a "strong Congressional intent for certainty and repose" during the part 70 permit term, unless there are strong reasons for a permit revision. The commenter also believes that concerns by regulatory agencies about the effect of off-permit changes are misplaced, and asserts that operating permits issued under State law, and State-only terms in part 70 permits are not constrained by part 70.

In response to comments that off-permit provisions should be retained for changes exempt from State minor NSR programs, the Agency disagrees, on the grounds that title V requires permits that "assure compliance with applicable requirements of this Act,

including the requirements of the applicable implementation plan" (section 504(a)). Consequently, the Agency believes that a part 70 permit must assure compliance with not just the SIP, but with all applicable requirements. If changes that are exempt from a State's minor NSR program are subject to applicable requirements such as NSPS or MACT standards, or to the provisions of State programs under sections 112(g) or 112(l), as some of them are, the Agency believes the permit must assure compliance with these requirements as well as it would assure compliance with requirements that are subject to NSR. Thus, the Agency disagrees that exemption from State minor NSR programs is an adequate rationale for retaining off-permit provisions.

The EPA also disagrees with the comment that the requirements of sections 502(b)(5)(A) and 504(a) of the Act are met if the permit contains all then-applicable requirements at issuance or renewal, and the permitting authority has ample authority to ensure that it does. The requirements of 502(b)(5)(A) cited by the commenter require that the permitting authority have authority to issue permits and assure compliance with "each applicable standard, regulation or requirement," which means, as the Agency reads it, that each time a change is made to which an applicable requirement applies, the permit must be revised to "assure compliance with that applicable requirement on an ongoing basis, unless the permit already provides for compliance with that applicable requirement.

In the Agency's view, the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement, except where the permit already complies with the applicable requirement by containing the terms implementing the requirement or terms providing for advance approval of the change without a permit revision. If the Agency were to follow the commenter’s suggestions, then it would not require States to revise permits at all during the term of the permit, except for reopening the

permit to satisfy the requirements of section 502(b)(9), i.e., that the permit be reopened to add newly-promulgated requirements. The EPA does not read the ongoing obligation to assure compliance with each standard, regulation, or requirement when applicable to permit such a result. On the contrary, the Agency believes that a principal objective of title V is to assure compliance with all applicable requirements of the Act, not only those recognized at the time of issuance or renewal, but also those that apply to changes made during the term of the permit. Although this approach results in the loss of some flexibility to permittees, eliminating the off-permit provisions gains substantial environment benefits since companies must certify compliance annually with applicable requirements that previously were off-permit. Consequently, a company must certify compliance with requirements to which it becomes subject up to 4 years earlier than it would have under the off-permit provisions.

Regarding the comment that sections 502(b)(9) and 502(b)(10) of the Act reflect a Congressional intent to avoid permit revisions, the Agency agrees that Congress intended that part 70 programs should, and in the case of section 502(b)(10) in limited circumstances must, provide ways to avoid permit revisions altogether. However, these provisions must be read consistently with the requirements that title V must assure compliance with all applicable requirements of the Act. The EPA believes that eliminating the off-permit provisions is the best way to reconcile these requirements.

Finally, the Agency emphasizes that elimination of the off-permit provisions affects only those changes made by the permittee that trigger newly applicable requirements. These changes, which were previously off-permit, must now undergo the relevant permit revision procedures of §§ 70.7(d), (e), (f), or (g). In contrast, deletion of the off-permit provisions does not affect applicable requirements that are adopted during the term of the permit, since these are subject to the reopening provisions under § 70.7(j) under today's part 70 revisions.

Consistent with section 502(b)(9), applicable requirements promulgated after issuance of the permit must undergo the permit reopening procedures of § 70.7(j)(2) if 3 or more years remain on the term of the permit. If less than 3 years remain on the permit, States may reopen the permit to incorporate newly-promulgated requirements, but are not required by part 70 to do so.

E. Changes Under Section 502(b)(10)

The previously discussed changes to § 70.4 have altered provisions that bear on the Agency's interpretation of section 502(b)(10). As noted in section V.A. of this preamble, section 502(b)(10) of the Act should not be read to require States to change applicable requirements to allow advance NSR or emissions caps that replace current requirements. In addition, as noted in section V.B. of this preamble, EPA believes that emissions cap requirements provide an appropriate means of implementing section 502(b)(10), but should not be required where such caps would conflict with applicable requirements. In preamble section V.C., EPA states that the provision for sources to make unilateral changes that contravene part 70 permit terms is an inappropriate means for implementing section 502(b)(10) consistently with other provisions of the Act. Finally, as explained in section V.D. above, EPA does not believe that the current off-permit provisions are consistent with all title V requirements, and the Agency is therefore deleting them as proposed.

Section 502(b)(10) must be read consistently with title V's requirement to assure compliance with all applicable requirements, as contained in such provisions as 502(b)(5)(A) and 504(a). The Agency believes that a consistent reading of the Act and proper implementation of all its requirements would not be achieved by any of the readings discussed above, or by any other overly broad reading of section 502(b)(10). The EPA believes that section 502(b)(10) is properly implemented through the following provisions of § 70.4(b)(12).

First, § 70.4(b)(12)(i) provides for permitting authority to

include in a permit terms for trading under an emissions cap, upon request by a permittee, provided the conditions of the paragraph are met. Permit terms and conditions allowing changes that lead to emissions increases and decreases pursuant to trading under the emissions cap implement section 502(b)(10) in EPA's view, so long as the conditions of § 70.4(b)(12)(i) are met to assure compliance with other requirements of the Act. Second, § 70.4(b)(12)(ii) provides for changes that trade emissions increases and decreases under the implementation plan, where such emissions trades are provided for under the implementation plan, so long as the conditions of the paragraph are met.

Finally, § 70.4(b)(12) allows changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act, the changes do not exceed the emissions allowable under the permit, and the remaining requirements of § 70.4(b)(12) are met. For the reasons discussed above, one such requirement is that any changes allowed pursuant to § 70.4(b)(12) shall not contravene or otherwise violate terms or conditions of the permit or any applicable requirement. This requirement has been added to the regulatory language to reflect this intent.

The EPA believes that the flexibility afforded by title V is met not only through the above interpretation of 502(b)(10), but also through the streamlined permit revision system being established in today's rulemaking. The permit revision system provides that, in many cases, changes that meet the criteria in section 502(b)(10) (i.e., changes that are not title I modifications and do not increase emissions allowable under the permit), but that nonetheless trigger new applicable requirements and require permit revisions, may be processed through procedures more streamlined than those included in section 502(b)(10). In short, the streamlined permit revisions process may require no revision or delay in many instances where changes under section 502(b)(10) otherwise would have required 7-day advance notification prior to the proposed changes.

Finally, EPA believes that the flexibility afforded by title V extends to alternative operating scenarios, including advance approvals. This approach offers an excellent means to assure that the Act's objectives to assure compliance with applicable requirements and to minimize delay associated with permit revisions are achieved consistently. Therefore, EPA believes that the interpretation of section 502(b)(10) taken today, together with the streamlined permit revision system, and expanded opportunities for alternative operating scenarios, adequately provides for operational flexibility, yet remains consistent with the other requirements of title V.

F. Time Period for Judicial Review

In the August 1994 notice, EPA proposed to require States to extend the maximum length of the time period for filing petitions for judicial review after a permit action. The original part 70 in § 70.4(b)(3)(xii) specifies a time period of 90 days, or such shorter time as the State shall designate. Several petitioners noted that some existing State or local statutes provide for longer periods and argued that it was inappropriate for the Federal government to require States to shorten these statutes. The EPA agreed and proposed to extend the maximum time period to 125 days, which the Agency believed would not require any State or local agency to revise its statutes of limitation.

Ten industry commenters opposed this proposal. One argued that 90 days is ample time for filing since potential petitioners will generally know immediately upon permit issuance whether they plan to petition or not. This commenter and others noted that this time period should be balanced against the need for finality. They feel that 125 days is too long in light of the position that the sources' potential liability during this time will effectively prevent them from securing financing, making contractual commitments, and actually operating any change (even one that was made via an otherwise streamlined process). Finally, one commenter argued that the period should be shortened to 60 days to be consistent with section 307 of the Act, which

governs EPA promulgation of rules and standards.

The EPA acknowledged in its proposal the need to ensure finality of permit actions, noting that this was the basis of the 90-day limit in the original part 70. However, EPA does not believe that extending the maximum time period to 125 days significantly undermines this finality. Part 70 does not preclude States from adopting shorter periods for review. Furthermore, the Agency is not aware of any State or local permitting authority who has lengthened or plans to lengthen its statute of limitations as a result of this change to the part 70 regulations. The EPA stands by its position of minimizing disruption to existing State statutes and is finalizing the change as proposed.

The EPA noted in the 1994 proposal, and notes today, that the maximum period of 125 days for judicial review under part 70 would not preclude States from adopting shorter periods. However, EPA wishes to clarify that it also believes that the judicial review time period has an implicit minimum length as well. In developing the part 70 regulations, EPA elected not to include an explicit requirement for the minimum length for judicial review period. However, EPA notes that some opportunity for judicial review must be provided according to section 502(b)(6) of the Act. If an extremely short time period is adopted, it would not constitute a valid opportunity for judicial review, and EPA could not approve the State program. Therefore, EPA wishes to discourage States from adopting judicial review time periods which are unreasonably short.

G. Interim Approval Criteria

Section 70.4(d)(3) contains the criteria EPA uses to determine if a program is eligible for interim approval. Two revisions were proposed in August 1994 for that section. The revision to paragraph (d)(3)(ii), promulgated on June 20, 1996 (61 FR 31443), allowed EPA to grant interim approval to programs that did not include minor NSR changes as applicable requirements.

The other proposed change, to paragraph (d)(3)(iv), would have allowed EPA to grant interim approval to programs that allowed minor NSR changes to be classified as minor permit revisions and thereby be exempted from public review. Minor NSR changes could not be classified as minor permit revisions because they were interpreted to be title I modifications. The criteria for what may be classified as a minor permit revision excludes title I modifications. Since that proposal, EPA has adopted the position that title I modifications do not include minor NSR changes thus allowing them to be classified as minor permit revisions and making the proposed change to paragraph (d)(3)(iv) unnecessary. That change, therefore, will not be adopted.

VI. Changes to Section 70.5

A. Insignificant Activities

In August 1994, EPA proposed to add a sentence to § 70.5(c) to clarify its existing policy for counting the emissions of insignificant activities and emissions levels in major source determinations. This sentence specified that "no emissions from an activity or emissions unit at a source may be discounted when determining major source status."

Five commenters submitted comments on this provision (2 regulatory agencies and 3 industry representatives). The regulatory agencies stated that they believed that the sentence would require all fugitive emissions and all emissions of section 112(r) substances to count toward major source status in conflict with the definition of major source and the applicability provisions of the current part 70. Industry commenters also stated that the proposal would interfere with the current definition of major source because the definition does not require insignificant activities to be included in major source determinations.

In response to commenters, EPA would like to clarify that proposed § 70.5(c) would not have affected how fugitive emissions, section 112(r) pollutants, or other types of emissions would be treated in major source determinations under part 70.

This proposed provision was intended to clarify that emissions or emissions units designation as "insignificant" should not be categorically excluded from major source applicability determinations. The determination of major source status is separate from, and occurs prior to, the determination of how activities or emissions are addressed in the permit application in § 70.5. The EPA believes that, while proposed § 70.5(c) may have been worded too broadly or imprecisely, it is clear from the context of the provision that emissions designated as "insignificant" are only "exempt" from certain application content requirements. The lack of specific reference in the definition of major source to "insignificant" emissions does not mean that all such emissions should be either excluded or included in major source determinations. Moreover, the final definition of major source specifically addresses how fugitive emissions and section 112(r) emissions are counted in major source determinations. The EPA proposed this language because it came to EPA's attention that many industrial representatives and a few States were misreading the provisions of § 70.5(c) concerning insignificant activities to affect major source determinations, and there was potential for resulting program deficiencies which could affect EPA's approval of State permit program submittals.

The EPA continues to believe that emissions should not be excluded from major source applicability determinations solely on the basis that they are deemed "insignificant" under the provisions of § 70.5(c) and that part 70 should include language to clarify this point. Accordingly, today's revisions retain this provision with minor wording changes to clarify its original intent.

B. Certification Language

In its August 1995 notice, EPA proposed to revise the language of § 70.5(d) that requires the responsible official to certify the truth, accuracy, and completeness of each part 70 application form, report, or compliance certification. This

proposal was intended to address issues raised by several State and local governments in their petitions for review of part 70 as to what certification language would be appropriate for the responsible official to use to make this certification. The governmental petitioners were concerned that EPA was requiring certification language different from that required by the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act, since they read the original part 70 certification language as potentially establishing a less rigorous standard for the inquiries on which certifications were to be based. Beyond that, they noted that the meaning of the NPDES language of 40 CFR 122.22(d) had been well established over the years of its use, and that the meaning of the different part 70 language would not be clear until it had been decided by the courts. After careful review, EPA proposed certification language similar to that found in the acid rain regulations promulgated under title IV of the Act at 40 CFR 72.21(b)(2), which EPA explained was modeled on the NPDES language.

State and industry commenters objected in general to the proposed revisions to the certification language, they opined that the original part 70 language was adequate to assure responsible officials conduct thorough inquiries before signing the certification, and they believed revisions to the original part 70 language would be disruptive to States and create confusion that would interfere with the implementation of title V. Several other commenters believed that the proposed language was significantly more stringent than the NPDES language, that part 70 should track NPDES more closely, and they suggested revisions to part 70 to make it more consistent with NPDES. Whether commenters thought the original part 70 language should be retained, unchanged, or revised to be more consistent with NPDES, they were opposed to the proposal language requiring the responsible official to "personally examine" and be "familiar with," the statements and information submitted in the document and its attachments.

Part 70 has been revised to make the certification language of § 70.5(d) more closely track the NPDES certification language of 40 CFR 122.22(d). Although the certification language used by the acid rain program is appropriate for those purposes, EPA believes the more appropriate language for part 70 purposes is the language used in the NPDES program. The EPA believes the NPDES and title V programs are similar in terms of complexity of information that must be included in forms and reports, and thus the NPDES program provides a better model for sources to certify the truth, accuracy, and completeness of forms and reports. Since title V is such a broad program that applies to each emissions unit at major sources, EPA agrees with commenters that the phrases "personally examine" and "be familiar with" in the proposed part 70 certification language would have required responsible officials, who are relatively high-level managers under the definition of "responsible official" in part 70, to certify a potentially large amount of detailed information. The EPA agrees with commenters that this would have been beyond the normal scope of their knowledge and responsibilities. The revised part 70 allows responsible officials to base their certifications on the opinions of technical staff who may be subject matter experts in the areas for which information is being collected and reported. In addition, EPA believes the revised part 70 requires the responsible official signing the certification to take reasonable steps to ensure that what he or she signs is true, accurate, and complete, not whether it provides a sufficient basis for a court to decide a question of law in the official's favor. The EPA believes differences in language between the proposed part 70 and NPDES certification language would have implied differences in meaning, and thus, today's revisions will result in the part 70 language being interpreted more consistently with the similar NPDES language.

VII. Changes to Section 70.6

A. Weekly Reporting of Alternative Scenarios

The original part 70 required sources, contemporaneous with

making a change from one alternative operating scenario to another, to record the operating scenario to which it is switching in a log at the permitted facility. As a point of clarification, alternative operating scenarios are the various methods of operation, configurations, etc., that are contained in, and allowed by, the permit. The permit must include monitoring provisions adequate to demonstrate compliance with each scenario.

The EPA proposed to revise § 70.6(a)(9)(i) in August 1994 to require sources to send the permitting authority a weekly notice of any changes in operating scenarios. In addition, the proposal provided that no weekly notice was required if monitoring records could be used to determine the operating scenario (because the different operating scenarios would utilize distinctly different monitoring which would be indicative of the specific operating scenario). Industry commenters voiced opposition to the proposed requirements for notification of changes in operating scenarios as burdensome and unnecessary.

The EPA agrees with commenters that the weekly notice would be too burdensome. Thus, the revisions to part 70 do not require State permitting programs to require sources to provide weekly notification to permitting authorities of changes in operating scenarios. Part 70 does retain the requirement that sources maintain an onsite log of changes in operating scenarios. However, the provisions of § 70.6(a)(6)(v) do provide that permitting authorities may request any information (which could include information concerning changes in operating scenarios) in writing from any source when the permitting authority believes such information will help them to determine compliance with the permit.

B. Emergency Defense

1. Background

The August 1995 notice solicited comment on the emergency defense provided in § 70.6(g) that set forth the terms of an affirmative defense that States could include in part 70 permits

at their discretion. The defense applied to violations of technology-based emissions limits that are unavoidably caused by "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God...." Section 70.6(g) did not cover start-ups, shut-downs, and preventative maintenance conditions. The petitioners in CAIP v. EPA sharply disagreed about the breadth of the defense and whether such a defense was appropriate. In the August 1995 notice, EPA solicited comment on numerous aspects of the defense, including (1) whether the defense should be available solely for emission limits established in the part 70 permit; (2) whether EPA should allow a start-up, shutdown, malfunction (SSM) defense for emission limits established in the part 70 permit; (3) whether part 70 should allow States to grant sources temporary authorization to make a change without a permit revision, as needed to protect public health or welfare in emergencies; and (4) the advantages and disadvantages of a uniform definition of upset or emergency across the water and air permitting programs. Each of these topics is discussed below.

2. Emergency Defense for Part 70-Only Permit Terms

a. Summary of the Proposal on Emergency Defense

In the August 1995 notice, at § 70.6(g)(2), EPA proposed to narrow the applicability of the emergency defense to emissions limitations established in the first instance by the part 70 permit. The preamble noted that the NSPS and MACT general provisions and most SIP's do not provide an emergency defense, per se. The Agency was concerned about whether an emergency defense applicable to such limits would slow the development of technology or make enforcement slower and less sure. The EPA was also concerned about the effect of a generic emergency defense on State-established emission limits and State enforcement goals. Finally, EPA was concerned about overlaying an emergency defense for standards where a conscious decision not to provide one had been made in the standard setting process (e.g., where a longer averaging time for determining compliance was established in a

standard as a means of providing for startups, shutdowns, and/or malfunctions).

The Agency solicited comment on whether to limit the availability of the emergency defense to part 70-only provisions, while noting it was still an open question as to whether part 70 can and should provide an emergency defense at all. The notice identified several types of emission limits that would be developed for the first time in part 70 permits and noted that some of those limits met the proposed definition of technology-based limits, i.e., the stringency of the limits are based on determinations of what is technologically feasible, considering relevant factors.

b. Summary of Comments on Emergency Defense

One environmental group commented that the overlay of an emergency defense in a part 70 permit provision would be an unlawful modification of the applicable requirement, that the defense was not necessary, and at most it should be limited to terms that are found only in (i.e., established by) part 70 permits.

On the other hand, numerous industry commenters strongly asserted that the defense should broadly apply to health-based standards as well as technology-based standards and to standards created in a Federal or State rule, as well as to requirements established solely in the part 70 permit. They contended that a defense should be available when sources rely on technology to comply with standards under the Act because it is unfair to penalize a source when technology fails due to circumstances beyond the control of the source. A commenter asserted that because the emergency defense was discretionary, there is no need for concern that the defense would decrease the stringency of previously established standards or would have an adverse affect on technology forcing or enforcement strategies. Commenters offered several reasons why reliance on prosecutorial discretion is insufficient protection for industry in emergency situations. First, there is no guarantee that EPA or the State would choose

to exercise this discretion in an emergency. Second, there remains the possibility of citizen suit. Third, many existing standards were developed prior to the 1990 Amendments, which increased EPA's penalty authority for violations and increased the visibility of violations by requiring increased monitoring, recordkeeping, and reporting. One commenter asserted that an upset defense is legally required for all technology-based limits. Finally, a commenter suggested that the emergency defense should be mandatory, not discretionary.

c. Discussion of Emergency Defense

Defense not retained for Federal standards. Although EPA has carefully weighed concerns from industry commenters regarding the emergency defense, EPA believes that the emergency defense should not be extended to federally-promulgated requirements. In general, EPA believes that its authority under title V to provide for affirmative defenses for violations of permit terms is limited. The statutory language of title V does not authorize establishing exemptions from requirements established pursuant to other Act provisions. (As noted in prior Federal Register notice discussions on this topic, EPA believes general authority exists to establish provisions (such as an affirmative defense) addressing the limits of technological controls in the title V permitting program if EPA failed to consider these concerns when developing the underlying requirement.) However, where the rulemaking establishing a limit does consider the limits of technological controls, there is at best a questionable basis in law, and no compelling basis in policy, for providing additional or different provisions under title V, even if the defense is available at the discretion of the State. Accordingly, the August 1995 notice indicated that there was little or no basis for providing a SSM defense in part 70, since EPA believes it has considered the failure of technology in setting the major technology-based standards under the Act (NSPS and MACT), or at a minimum, has given commenters on those standards an opportunity to show that provisions to account for technology failures should

be incorporated into those standards. For this reason and because the emergency defense in § 70.6(g) overlaps with the protection of the SSM defenses and exemptions in existing federally-promulgated standards, EPA believes that no further defense should be extended through the permit for Federal technology-based standards. The EPA believes that with respect to Federal technology-based standards, sources should have a level playing field in which sources that are subject to NSPS and MACT standards may avail themselves of the same defense regardless of the source's location, an objective that is undercut by providing States discretion to adopt an additional defense. As to Federal health-based standards, EPA does not believe it has the authority to provide a defense for such standards, as is explained below.

Defense retained for certain SIP limits. The EPA believes that the emergency defense should be retained for certain State limits. Some SIP's do not contain provisions that provide sources relief from violations during SSM conditions.[10] In addition, some SIP provisions are narrowly drawn to provide significantly less relief when technology fails than would be allowed under the SSM provisions of the NSPS and MACT standards. Thus, while the emergency defense in the original § 70.6(g) was largely redundant with the SSM exemption for NSPS and MACT standards, there was less overlap with State SIP rules. The EPA is aware that few SIP's address emergencies per se (as opposed to SSM conditions), other than those that have been revised to incorporate defenses designed to bring the permit program into compliance with § 70.6(g). For these reasons, EPA believes it is appropriate to retain the emergency defense for technology-based SIP provisions, again at the discretion of the State. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic

[10] For example, the Louisiana SIP does not contain a start-up, shut-down, malfunction provision per se but requires notification of certain emergency occurrences or upsets. LA LAC 33:III.927.

air pollutants does not change their character as technology-based standards. (On the other hand, if Federal standards such as NSPS or MACT standards are incorporated into the SIP by a State as a State standard, the incorporation does not alter the fact that the emergency defense would be inapplicable to permit terms and limits based on those standards.) The EPA will leave it to those States to decide in the first instance whether extending the defense to technology-based limits in the SIP would have any effect on State goals regarding enforcement and the development of technology. States must also account for the effects of extending the defense in their attainment demonstrations.

Health-based standards. The EPA does not agree that it has the authority to or that it would be appropriate to create in part 70 an emergency defense to health-based standards. The emergency defense is inapplicable to standards set without regard to technological feasibility, such as NESHAP, and to State rules or permit terms (such as limits that result from modeling exercises) for which the permitting authority directly links compliance to attainment of the NAAQS or the achievement of a health-based standard. Even for health-based standards, however, EPA agrees that as a matter of exercising its enforcement discretion, it may be inappropriate for EPA to impose a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the source. Indeed, EPA has often used its enforcement discretion by declining to seek penalties in such cases. However, case law and Agency policy have consistently recognized that exemptions and affirmative defenses should not be available for violations of health based standards. See memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, dated 2-15-83, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (hereafter "Bennett memorandum"). To allow exemptions and affirmative defenses to health-based standards for periods of excess emissions can pose a threat to national ambient

air quality standards and other requirements, such as pre-1990 NESHAP, where health considerations were considered paramount to failures of technology.

The EPA's policy is to use an enforcement discretion approach for exceedances of health-based standards due to sudden and unavoidable malfunctions. The EPA generally considers several criteria for the exercise of that discretion, including but not limited to a requirement that the control equipment was maintained and operated in a manner consistent with good practices for minimizing emissions, that repairs were expeditiously completed, and that excess emissions were minimized. The EPA disagrees that this approach is unfair to industry and notes that industry has not documented in the record instances of unfair enforcement actions to support their concerns. Although industry commenters have raised the prospect of numerous citizen suits as grounds for an emergency defense, commenters provided nothing beyond speculation that sources might be subject to unreasonable penalties for violations of standards during emergencies. Even so, EPA believes that much of industry's concern about citizen suits should be allayed by the retention of the emergency defense for State technology-based limits.

Increased monitoring, recordkeeping, and reporting requirements. The EPA does agree that violations will become more apparent to permitting agencies and to the public as a result of the monitoring, recordkeeping, and reporting requirements of part 70, but disagrees that this is a valid reason for enlarging the defense to include health-based standards. To the contrary, better enforcement is one of the key objectives of title V and the 1990 Amendments. A primary benefit of the title V program is that it clarifies which requirements apply to a source, including reporting requirements. As a result, the source, States, EPA, and the public can better understand the requirements to which the source is subject, whether the source is meeting those requirements, and the reasons

for any periods of noncompliance. The title V program was designed to increase source accountability and enhance compliance and enforcement. Also, with respect to the concern about higher penalties subsequent to passage of the 1990 Amendments, EPA does not agree that higher penalties in and of themselves would justify a defense against enforcement actions for sources that exceed emission limits. Such a defense would be contrary to the intent of the Act to increase compliance through the Agency's and citizens' expanded enforcement authority.

Emergency defense not required for all technology-based standards. The EPA disagrees that it is required to extend an "upset" defense to all technology-based standards. The commenter relies on case law involving the Clean Water Act in which the courts have required EPA to provide an "upset" defense which is similar to both the emergency defense provided by § 70.6(g) and to the SSM exemptions and defenses that are contained in numerous existing requirements. As stated in the August 1995 notice, the relevant case law is split. While several courts have required EPA to provide an upset defense to address the fallibility of technology, other courts have not, out of concern that such a defense was inconsistent with Congress's intent that technology-based effluent limits force technological development and that enforcement of such limits be swift and direct. See 60 FR 45559 for a further discussion of relevant cases. Furthermore, commenters did not demonstrate or even allege that specific existing Federal standards have failed to account for the fallibility of technology.[11] The EPA is not aware of Federal standards that are lacking in this respect. If they were, the

[11]A commenter was concerned that some control technology guidance documents (CTG) lack SSM provisions. However, CTG's are guidance documents, not standards. Therefore, CTG's set forth presumptive control requirements but do not necessarily address all aspects of a regulation. States are free to rely on the CTG in developing limits in their SIP's. Furthermore, to the extent the State and EPA determine is appropriate, the State may include limited exemptions and defenses based on the fallibility of technology.

more rational solution would be to address the problem through revisions to each standard, rather than an across-the-board fix that treats all standards alike regardless of whether the underlying standards have already accounted for technological fallibility.

Limits created in the part 70 permit. The August 1995 notice indicated that where the part 70 permit itself creates the requirement, an emergency defense may be appropriate. Requirements created in part 70 permits include technology-based limits pursuant to sections 112(g) and 112(j) of the Act and alternative limits pursuant to § 70.6(a)(1)(iii) and section 112(l) of the Act, which may or may not be technology-based, as explained below.

Other limits that are set in the permit include limits under section 112(i)(5) of the Act and limitations on PTE. These do not meet the definition of technology-based standards because they are not based on a determination of what is technologically feasible. Accordingly, the emergency defense does not apply to such terms. However, § 70.6(g) does not limit State authority to fashion appropriate limits on mass emissions. States may have authority under State law to account for SSM or emergency conditions when creating these limits. If so, the fact that the State part 70 program does not authorize the emergency defense is irrelevant. However, EPA notes that since PTE and section 112(i)(5) limits are designed to limit annual mass emissions below the major source thresholds, the effect of emissions during emergency or SSM events on the threshold must be considered (i.e., will the limit, taking into account its emergency or SSM provisions, effectively keep the source below the relevant annual emissions thresholds).

For alternative standards under § 70.6(a)(1)(iii) and section 112(l), in general, the Agency believes that the establishment of an exemption or affirmative defense is appropriate only where the standard for which the alternative is developed contains such an exemption or defense. Absent such a

defense in the original requirement, a source would need to show that an alternative requirement containing a defense was, despite its defense, equivalent to the original requirement. Whether equivalency could be demonstrated depends on whether emissions during malfunctions or emergencies can be estimated and factored into the equivalency determination. If an alternative with an exemption or defense can be shown to be equivalent, then part 70 may authorize it. Conversely, an alternative with a defense that cannot be shown to be equivalent could not be approved by EPA.

After considering whether to extend the emergency defense to limits established pursuant to 112(g) and 112(j), EPA was unable to justify providing the defense to limits under 112(g) and 112(j) when it would not be available to those set under 112(d). As stated above, EPA does not believe it is appropriate to retain the emergency defense for MACT standards because EPA considered the failure of technology when setting the standards and because the defense is largely redundant with the SSM exemption that applies to MACT standards. The EPA believes it would be unfair if a source that is subject to 112(g) is granted an emergency defense but the same type of source with the same modification would be denied the defense if its modification occurred after the 112(d) standard is effective.

An emergency defense for limits established pursuant to 112(g) and 112(j) would be largely redundant since part 63 provides a malfunction exemption for "any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner." The exemptions provided for in the general provisions may be applied to 112(g) and (j) requirements. The EPA believes that most conditions that qualify as emergencies would also qualify as malfunctions as defined in part 63. For the remainder, natural disasters, EPA believes that enforcement discretion would prevent the source from unfairly being held to a standard with which it was impossible to comply. The EPA and States can consider any demonstration by the source that the

excess emissions were due to an unavoidable occurrence in determining whether any enforcement action is required. With respect to industry's concern about citizen suits, EPA is not persuaded by comments from industry that there is cause for significant concern during natural disasters that would not otherwise be covered by the SSM exemption applicable to MACT standards. When a natural disaster such as flood or earthquake or other legitimate emergency causes a source to exceed its emission limits, EPA believes citizens are unlikely to initiate enforcement actions. Should this prove not to be the case, and should courts in such actions decline to exercise their discretion to not impose penalties under such extenuating circumstances, EPA would reconsider its position.

3. Start-Up, Shut-Down, Malfunction Defense for Part 70-Only Permit Terms

a. Summary of the Proposal on SSM Defense

In the August 1995 notice, EPA proposed to allow States to extend a SSM defense to technology-based limits established in the part 70 permit. It solicited comment on whether such a defense should be conditioned on the submittal of and adherence to a plan like that required in § 63.6(e)(3).

b. Summary of Comments on SSM Defense

Commenters generally supported extending a SSM defense to technology-based requirements established in the part 70 permit. They asserted that such a provision would remove any doubt that States can authorize an affirmative defense to violations of part 70 permit conditions during SSM periods and that the defense is consistent with the goal of providing States flexibility in managing their part 70 programs. Commenters generally agreed that an affirmative defense for SSM conditions should be conditioned on the submittal of, and adherence to, a SSM plan.

c. Discussion of SSM Defense

Given that the universe of technology-based changes for which such a defense would be appropriate is limited to 112(g) and 112(j), there is no need for part 70 to address this issue.

A State establishing a 112(g) or 112(j) limit is authorized to incorporate the SSM provisions of the part 63 general provisions.

4. Advance Authorization for Emergencies

a. Summary of the Proposal on Emergency Authorization

In the August 1995 notice, EPA solicited comment on whether part 70 should grant a source temporary authorization to make a change without revising its permit, as needed to protect public health or welfare in emergencies, such as natural disasters. Both the South Coast Air Quality Management District and the State of New York have available as a matter of State law a mechanism for granting sources temporary authorizations to make changes without revising the sources permits under specified circumstances (such as earthquakes, fires, and severe winter storms) in accordance with proscribed procedures.

b. Summary of Comments on Emergency Authorization

Commenters were generally supportive of this proposal and cited examples of situations where responses to emergencies and natural disasters forced a source to exceed permit limits. It was suggested that the defense should be available to both privately- and publicly-owned facilities that provide essential services. Many commenters suggested that given the wide range of activities that may qualify for temporary authorization, EPA should let States define the scope of activities that qualify. Several commenters proposed procedural safeguards for the authorization. One commenter proposed the adoption of a defense that would be applicable to National security emergencies. Several commenters argued that reliance on prosecutorial discretion is insufficient protection from liability in these situations because the Act allows private citizens to bring an unjustified enforcement action in a case where compliance was impossible.

c. Discussion of Emergency Authorization

After further consideration, EPA does not believe such an authorization is warranted. In the Agency's view, the exercise of enforcement discretion and judicial notions of equity should

prevent the imposition of penalties for violations incurred as a result of actions taken to safeguard the public from serious harm in times of emergency. For example, if a power plant needed to produce more power in an emergency and consequently violated a permit term, it is highly unlikely that the State or EPA would consider bringing an enforcement action. It is also doubtful that citizens would waste time and resources by seeking to prosecute a violation caused by a source's actions to respond to a public health crisis. The EPA is unaware of any instances where an enforcement action was brought against a source that violated an emissions limit due to natural disaster, nor did the commenters provide any examples where States, EPA, or citizens sought enforcement under these circumstances.

5. Uniform Definition of Emergency for Air and Water Permits Programs.

a. Summary of Proposal on Emergency Definition

The EPA solicited comment in the August 1995 notice on the advantages and disadvantages of a uniform definition of upset or emergency across the water and air permitting programs. The emergency defense in § 70.6(g) was modeled on, but not identical to, the definition of "upset" under the NPDES regulations (40 CFR 122.41(n)).

b. Summary of Comments on Emergency Definition

Commenters were split on this issue, with a majority favoring a uniform definition. Those favoring different definitions pointed to the vastly different control strategies involved under the air and water programs.

c. Discussion of Emergency Definition

The EPA does not believe that on balance, there are significant advantages to revising the definition of "emergency" to be identical with the definition of "upset." The EPA does not agree with commenters who suggested that the definition of "upset" is more precise and objective than the definition of "emergency." The EPA believes that courts, States, EPA, and the public can readily ascertain the meaning of the term "emergency."

Also, the emergency defense is designed to supplement the traditional SSM provisions that are found in air standards while the upset provision of the NPDES program was envisioned as a supplement to the "bypass" provisions in the NPDES regulations. Since the definitions of "emergency" and "upset" were designed to complement different defenses, it would be difficult to make them identical without affecting the Agency's goal in adopting them initially. Furthermore, EPA agrees with the commenter who stated that an identical defense for different media is not warranted because of the vastly different control strategies required for protecting the air and water.

VIII. Changes to Section 70.7

A. Structure of the Revised Permit Revision System

The original part 70 provided for three types of permit revisions: significant permit revisions, minor permit revisions, and administrative amendments. The August 1994 notice proposed to add a fourth type called the de minimis permit revision. The notice also proposed to substantially change the eligibility criteria for minor permit revisions. Reacting to negative comment on the 1994 proposal, EPA, proposed in August 1995 to simplify the permit revision system and build on existing State processes by dividing changes at a source that required permit revisions into two broad classifications; those that were subject to prior State review (e.g., NSR and source-specific SIP revisions) and those that were not. Within each classification were two levels of changes; more environmentally significant (MES) changes and less environmentally significant (LES) changes. Within the LES changes were de minimis changes, for which no public or EPA review or citizen petition opportunity was required. Under the class of changes not subject to prior State review, there were provisions for administrative amendments and changes which required no process other than a notice to the permitting authority.

Commenters expressed confusion with the August 1995 proposal in that the same three types of changes (MES, LES, de minimis)

existed whether the change was subject to prior State review or not. In addition, the level of public and EPA review was the same for both types of MES changes and for both types of LES changes. Commenters indicated the system seemed to have up to six or eight tracks, rather than just two.

The EPA agrees that the duplicative nomenclature and process could be improved. Consequently, the system has been restructured to combine changes that have the same public and EPA review requirements, regardless of whether they are subject to prior State review. Further, the part 70 revisions being adopted today use the nomenclature of the original part 70. Thus, changes for which the highest level of review is required are called significant permit revisions rather than MES changes, and those with the next lower level of review are called minor permit revisions, rather than LES changes. Changes that have the least review (administrative amendments, notice-only changes, and de minimis changes), are called as a group "expedited permit revisions" because the minimal review allows the changes to be made quickly. This system should be understood more easily since it conforms closely to the original part 70 structure and avoids introducing another layer of terminology.

Since this preamble discusses both the proposed and final revisions to part 70, it will use both the proposed terminology (e.g., MES and LES) and the final terminology used in today's revisions. For example, a discussion may refer to proposed requirements for the MES category, but then talk of the final requirements for significant permit revisions. Both refer to the same category, just as LES changes and minor permit revisions are the same category.

For changes that go through a prior State process, the August 1995 proposal would have required States to merge the part 70 permit revision process with the prior State process to reduce duplication of administrative burden. Such a program was termed a "merged" program. In today's revisions, merged programs are covered under a new § 70.7(h), which provides for, but does

not require, merging of the part 70 process with the prior State process. Merging allows the permitting authority to review part 70 permit terms during the State review process, instead of during a separate part 70 permit revision process. For significant and minor permit revisions, public and EPA review would also occur during the prior State process. Merging is discussed in more detail in section VIII.3. of this preamble.

In summary, the new permit revision system consists of: (1) significant permit revisions, corresponding to the August 1995 proposed MES changes; (2) minor permit revisions, corresponding to the August 1995 proposed LES changes that were not exempt from public comment; and (3) expedited permit revisions, corresponding to the August 1995 proposed LES changes that were exempt from public and EPA review.

Significant permit revisions undergo the same process as initial permit issuance or permit renewal. The minor permit revision process provides for a shortened permit revision process. Public review may be less than 30 days and may, in some circumstances, occur after permit issuance, and EPA review may be shortened.

All expedited permit revisions may be made without opportunity for public comment, EPA objection, review by affected States, or citizen petition. At least quarterly, the permitting authority must provide notice to the public of de minimis and notice-only changes. Notice-only permit revisions may be made by the source upon telefaxing or mailing the permit revision application to the permitting authority, at which time the source may make the change. Approval by the permitting authority is not necessary. Administrative amendments may be made by the source or the permitting authority. For eligibility criteria and further detail on each permit revision process, see the following discussions.

B. Notice of Application Completeness

The August 1994 notice proposed to revise § 70.7(a)(4) to reflect the proposed permit revision system. This section

requires the permitting authority to notify the applicant that a permit application is complete. It has been reworked to conform to the permit revision system being adopted in today's action and to clarify the requirements with respect to permit revisions.

The revised § 70.7(a)(4) requires the permitting authority to notify the applicant that the permit application is complete and provides that, unless the permitting authority requests additional information or notifies the applicant of incompleteness within 60 days, the application will be deemed complete. These requirements are now applicable only for original and renewal permit applications since the requirements result in the source's being covered by an application shield. Since no application shield is necessary for permit revisions (i.e., permit revisions are initiated by sources), it is not necessary to provide the 60-day default completeness. Also, it is not necessary for the applicant to know if the application is complete, it is only necessary to know if the application is incomplete. Section 70.7(a)(4) is therefore changed to include the provision that the permitting authority will notify the applicant only if a permit revision application is incomplete.

A corresponding change is made to the 60-day default completeness provisions of § 70.5(a)(2) to eliminate a reference to § 70.7(a)(4). This reference was necessary in the original § 70.5(a)(2) to identify an exception to the 60-day default completeness provisions pertaining to minor permit modifications. This exception is no longer in § 70.7(a)(4) since the default completeness provisions do not apply to permit revision applications.

C. Expedited Permit Revisions

1. Exempting permit revisions from procedural requirements

Title V on its face requires three types of review for permit revisions: (1) public notice and an opportunity for public comment and a hearing under section 502(b)(6); (2) an opportunity for EPA review and objection under section 505(b)(1); and (3) an opportunity for citizens to petition EPA to object

under section 505(b)(2). Today's part 70 revisions allow States to exempt several types of permit revisions from these requirements. The basis for this exemption is the "de minimis" standard established under Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). This standard allows for exemptions from statutory requirements if the application of the requirements would result in a benefit of trivial value.

In deciding trivial value, the core issue is whether the environmental benefit from strict application of the statute would be trivial. As discussed below, EPA believes that trivial environmental benefit rests on whether: (1) the change involves a limited amount of judgment; or (2) it results in a trivial environmental impact. Either of these bases is a legitimate reason for excluding de minimis changes from the title V review requirements mentioned above.

Today's part 70 revisions apply the standard under Alabama Power to the three types of part 70 permit revisions in the expedited permit revision category: administrative amendment, notice-only, and de minimis. The revised part 70 allows States to exempt each of these permit revision types from the public notice and comment, EPA objection, and citizen petition requirements of title V. For administrative amendments and notice-only permit revisions, the justification is that the changes involve little or no judgment. For de minimis permit revisions there are two justifications: (1) the changes involve little or no judgment; or (2) they result in a trivial environmental impact.

As for why little or no judgment should justify an exemption from public and EPA review, recall that the function of the title V permit is to incorporate and assure compliance with Act requirements that apply to a facility. It should follow that where the act of incorporating requirements into the permit, and thus "assuring compliance" with those requirements, requires little or no judgment, there will be little or nothing to review and public or EPA review would be of trivial or no value. This

is true especially where the permit repeats or references the requirements essentially verbatim from the regulatory form, as in the notice-only process. It may also be true that minimal judgment is needed to establish monitoring requirements to assure compliance with applicable requirements, which may occur for changes in the de minimis category. For example, if a SIP rule requires the use of covers on vapor degreasers, little judgment is needed to decide that an appropriate method of monitoring compliance is to require records of how often the covers are in place. Requiring public and EPA review of such minimal decisions would result in a trivial benefit since it is very likely that the permit will assure compliance with the applicable requirements; hence, these types of changes would be de minimis within the standard of Alabama Power.

Clearly, the little or no judgment justification is appropriate for the type of administrative changes allowed under the administrative amendment process, such as correcting typographical errors, changing phone numbers or plant contacts, or recording a change of ownership. That the level of judgment involved in these sorts of changes is trivial is self-evident. Furthermore, since these types of changes do not affect the substantive requirements of the permit, the environmental impact of the change is also trivial, even if some level of judgment were involved. Today's revisions also include under administrative amendments the initial incorporation of recently-promulgated section 112 standards. The Agency believes that incorporation of these standards as administrative amendments would also require minimal judgment, since the source has already identified that it is subject to the newly-promulgated MACT standard by sending in the initial notification required under part 63.

The little or no judgment rationale also applies clearly to the notice-only category. For one thing, the notice-only process may only incorporate applicable requirements specified in underlying rules; it cannot create any new requirements.

Consequently, changes that establish source-specific permit conditions, such as compliance assurance monitoring (CAM) or periodic monitoring, and that often involve judgment are not eligible for notice-only. As a result, the only judgment that should be involved during a notice-only action is in deciding which promulgated requirements apply to the change. As explained in the discussion on the notice-only process, EPA believes the applicability judgments for notice-only changes will be limited because the source must identify the requirements it believes apply and certify that it is in compliance with them. If a source was uncertain as to which requirements it was supposed to meet, it would seek the advice of the permitting authority or EPA, rather than submit a possibly false certification.

Finally, the little or no judgment rationale also applies to the de minimis permit revision category. In contrast to the notice-only process where no new requirements are created, de minimis changes may establish source-specific requirements. If minimal judgment is needed to establish the requirements, then the benefit of requiring EPA and public review would be trivial. Conversely, if the level of judgment is not minimal, then the benefit of review cannot be said to be trivial and the change cannot be de minimis on that basis. Changes that would otherwise be eligible for notice-only, except that review by the permitting authority is required, by definition do not establish new requirements. Consequently, they should be obvious candidates for the de minimis category. An example would be a change subject to categorical requirements under a State minor NSR program, where review by the permitting authority is needed. Assuming monitoring to assure compliance is not needed, this change would be eligible for the notice-only process except for the required State review as a minor NSR change. Because it involves no judgment to incorporate the categorical requirements into the permit, and no source-specific requirements are created, it could be a de minimis permit revision. In contrast, emissions limits or control requirements established on a case-by-case

basis are prime examples of exercises that may require a significant level of judgment, and thus warrant public and EPA review.

The second, independent basis for de minimis changes is that the change results in a trivial environmental impact. The rationale is that the benefit of providing public and EPA review will be trivial if the change has a potentially small effect on the environment. This by itself satisfies the de minimis standard under Alabama Power.

The trivial environmental impact rationale is not dependent on the level of judgment rationale. Changes that are trivial in terms of emissions and ambient impact will still have a trivial impact even if the judgment to be made in the part 70 permitting action is exercised improperly. For example, if a State determines that units with a PTE of 5 tons per year (tpy) or less have trivial environmental impact, these changes would be de minimis even if substantial judgment were required to establish monitoring for some of these units. Requiring public and EPA review for the monitoring may improve the effectiveness of the monitoring requirement, but the environmental benefit of the review would still be trivial due to the size of the unit. Thus, if the potential environmental impact from a change is trivial, States need not consider whether the level of judgment involved is limited.

Conversely, if the potential environmental impact is not trivial, a change may still be considered de minimis if the level of judgment is shown to be minimal. Review of changes where little judgment is needed to incorporate the change into the permit would yield a trivial benefit regardless of the environmental impact. Moreover, if the permit process accurately incorporates the applicable requirements, the environmental impact of any change will be limited to that which is allowed by the applicable requirement. If little or no judgment is required to accomplish this task, for example, the permit only needs to repeat the provisions of a NSPS regulation that are clearly

applicable, not establish new monitoring terms, then review by the public or EPA is unlikely to change the proposed permit and would thus add little or no benefit. Furthermore, the environmental impact resulting from de minimis changes is bound to be low, since today's part 70 revisions do not allow changes involving potentially large emission increases (e.g., major NSR, netouts, and PTE limits) in the expedited revision category.

Perhaps the easiest way to create a de minimis category based on trivial environmental impact is to establish a de minimis emissions cutoff. The cutoff needs to be justified as small in comparison to relevant major source thresholds or the PSD or NSR significance levels, and the potential ambient impacts of changes below the cutoff must be shown to be trivial. An additional way of describing de minimis changes is to define changes that are inherently low-polluting. Examples are printers employing radiation-cured inks or coaters using powder coatings, both of which contain little or no VOCs.

States should not interpret the environmental impact criterion to allow inclusion in a de minimis category of alternative emission limits, test methods, monitoring requirements, or other changes where equivalency with applicable requirements must be decided. To predict environmental impact, one must know whether the proposed term is equivalent to the applicable requirement. It cannot be assumed that there is no environmental impact because that would assume that the proposed permit term is equivalent, which may not prove to be the case. Consequently, it is far better to use the level of judgement criteria for determinations of equivalency. The revised part 70 requires most changes that involve determinations of equivalency to undergo significant permit revision procedures; however, if they do not, States should use the level of judgment criterion as a basis for calling these changes de minimis, rather than the environmental impact criterion.

Today's revisions prohibit netting and PTE limits to avoid major source requirements from the de minimis category. In

general, EPA believes that both these revisions involve substantial level of judgment and potentially significant environmental impact. Thus, these kinds of permit revisions do not meet the statutory de minimis standard, and therefore, public and EPA review cannot be eliminated through a de minimis theory. Permit revisions involving calculations of net emission increases or establishing limits on PTE to avoid major source requirements by their nature involve significant judgment in determining if the netting calculations are done correctly, or if the PTE limit is effective and enforceable. **[Subject to change if we allow states to exempt small netouts in serious/severe NA areas.]** The Agency also notes that any change required to be included in the significant permit revision or minor permit revision category cannot be included in the expedited permit revision category.

In addition to exemptions from review for part 70, today's notice revises part 51 to allow States to exempt minor NSR changes from public review if they can demonstrate that the changes are de minimis. The purpose of this revision is to make the public review requirements of part 51 and part 70 consistent for changes subject to both minor NSR and title V, and therefore to make it easier for States to merge the minor NSR and part 70 permit review processes. This is important because EPA expects that most changes eligible for the de minimis category will be new or modified units subject to both minor NSR and part 70.

The same criteria for de minimis would apply to part 51: little or no judgment or trivial environmental impact. Since the purposes of the NSR and part 70 programs are different, however, the judgment criterion must apply differently depending on whether a change is subject only to part 70 or to both NSR and part 70. The part 70 criterion for declaring a change de minimis based on judgment is that incorporating applicable requirements into the part 70 permit, or establishing requirements to assure compliance, involves minimal judgment. For example, if the applicable requirement is deficient in monitoring, the part 70 permit must add monitoring to assure compliance with the

applicable requirement. If the change is also subject to NSR, as most de minimis changes will be, the judgment criterion also must consider whether the requirements established in the NSR permit involve minimal judgment, but only for the purpose of determining if the change is exempt from public review under part 51.

These two judgment criteria are related only to their respective parts, i.e., part 51 and part 70. That is, the exemption from public and EPA review, and citizen petition, under part 70 need not consider judgment involved in establishing NSR requirements. For example, if a change involves substantial judgment to establish case-by-case requirements under minor NSR and, as a result, does not qualify as de minimis, then it would be subject to public review under part 51. But if the change when incorporated into the part 70 permit required no monitoring, or the monitoring required involved little judgment, then, if otherwise eligible, it could be de minimis under part 70 and exempt from public and EPA review and citizen petition.

2. Administrative Amendments

The provisions for administrative amendments are essentially the same as the original part 70 except for addition of § 70.7(e)(1)(i)(E) which provides for initial incorporation of a MACT standard by the permitting authority. This provision was proposed in the August 1994 notice. Commenters generally focused on the second step of the MACT incorporation process rather than this first step. One commenter, however, felt the first step was not necessary, only the second step during which the source would incorporate source-specific compliance parameters into the permit.

The EPA disagrees that this first step is unnecessary. A MACT standard is an applicable requirement which in the original § 70.7(f) was required to be incorporated into the permit within 18 months of being set unless less than 3 years remained on the permit term. The Agency feels this requirement is still appropriate. Furthermore, if a source must operate in a way that conflicts with the permit to determine the source-specific

compliance parameters, the permit must allow that operation, and thus must be revised to incorporate the new MACT standard.

The rationale for allowing an administrative amendment to incorporate MACT standards is that the standards have already been reviewed by the public and EPA and essentially will be placed word-for-word into the permit. The only time public and EPA review will be necessary is when the source determines source-specific compliance parameters and adopts them into the permit.

More discussion of this process is included in section VIII.H. of this preamble.

3. Notice-only Permit Revisions

a. Summary of the Proposal on Notice-Only Permit Revisions

In the August 1995 notice at § 70.7(f)(2)(v)(C), EPA proposed an expeditious process for permit revisions for changes that do not require prior approval by the permitting authority, if the change does not conflict with the existing permit (i.e., that the source can comply with the requirements that apply to the change without violating existing permit terms). The preamble also stated that the change should not involve any source-specific tailoring of the requirements, such as the creation of compliance requirements for a MACT standard. This process has been informally called the "notice-and-go" process, since the source could operate the change after submitting a notice to the permitting authority, without waiting for action by the permitting authority. An example of a change eligible for notice-and-go would be the installation of a degreasing unit subject to the halogenated solvent cleaning MACT standard under subpart __ of Part 63, where the facility elects to meet the standard through one or more of the compliance options specified in the MACT standard. This change is eligible for the notice-and-go process because the requirements that apply to the change are those that are specified in the underlying requirement. In today's revisions to part 70, this process is termed "notice-only."

b. Summary of Comments on Notice-Only Permit Revisions

Several commenters opposed EPA's criterion that changes must not conflict with the existing permit, asserting that many changes would conflict with the permit and such a restriction would mean that few changes would be eligible for this process. Commenters offered several examples in which changes at a facility triggered new or different requirements with which the source must comply, and as a result were no longer subject to the requirements in the permit. Under such circumstances they believe the permit must be changed to resolve the "conflict." Some commenters also believed that conflicts with the permit must be allowed under section 502(b)(10) if the change is not a title I modification and does not exceed the emissions allowed in the permit, which they believe includes many changes involving conflicts.

Commenters also expressed confusion between the proposed notice-only process and the de minimis change category, and suggested that EPA combine these into one category. Commenters also urged EPA to clarify eligibility of these two categories, by listing all changes qualifying for automatic permit revision and specifying whether a notice from a source is required or whether the permitting authority should attach the change to the permit.

Some commenters recommended that EPA allow notice-only for adding alternative operating scenarios and title VI requirements (e.g., refrigerant recycling rule). Another commenter suggested that adding identical units already covered by existing permit terms should not need even a notice, since the commenter believes these could be treated as "off-permit." Other commenters requested that EPA identify the provisions of §§ 70.6(a) and (c) that may be satisfied in form language versus those that need to be specifically addressed in the notice. Another commenter asked that the notice not be restricted to certified mail, but that EPA allow hand-delivery, express services, or other methods of delivery.

The States' and local agencies' association suggested that

no notice should be needed for changes that are exempt from State review programs, on the theory that the purpose of title V was to improve compliance with the State NSR provisions, and consequently, that EPA should not require the permit to include changes that are not subject to State NSR provisions or, if they must be on the permit, not require these changes to undergo any permit revision process.

c. Discussion of Notice-Only Permit Revisions

The EPA agrees with commenters suggesting that notice-only permit revisions should be available for revisions that conflict with existing permit terms, if the source adopts provisions exactly as established in the underlying requirement and does not establish source-specific requirements through the notice-only process. A "conflict" here means that the operational change triggers a different provision of an applicable requirement and is no longer subject to an another provision of the same applicable requirement. This sets up a conflict with the existing permit, since until the permit is changed, the source cannot comply both with the new requirement and its existing permit. For example, if a source with a Group 2 process vent that is subject to Subpart G provisions changes the flow rate so that it becomes a Group 1 process vent, the Group 1 requirements will apply rather than Group 2 requirements, along with different emission limits and monitoring and recordkeeping requirements. The source must comply with Group 1 requirements, but the permit says it must comply with Group 2 requirements. To qualify for the notice-only process, the conflict must be in the same applicable requirement, and cannot include conflicts between different applicable requirements, which still apply after the change. For example, if a change triggers application of a MACT standard which conflicts with an existing NSPS or RACT requirement, both the new MACT standard and the existing NSPS or RACT standards still apply. Those types of conflicts between applicable requirements are required to be revised through the significant permit revision procedures. The streamlining process

discussed in EPA's White Paper Number 2 may also be utilized.

If the source correctly identifies the requirements that applied to the unit before the change, but which no longer apply, and replaces these with the correct requirements which apply to the modified unit, EPA believes a notice-only process is appropriate for the conflict situation described above. To ensure that correct identification of the applicable requirements occurs, EPA is requiring the source to certify in the notice that it is in compliance with all applicable requirements to which the change is subject. The purpose of this certification is to identify not only new applicable requirements, such as a MACT standard, but also all existing requirements, such as RACT, NSPS, or minor NSR, which still apply.

Some commenters were confused between the notice-only process and the de minimis category. There are several differences between the two processes, however. Notice-only changes are not allowed to create custom-made requirements, while changes in the de minimis category (such as minor NSR permits) may need additional monitoring requirements created by the part 70 permit. Notice-only changes also can be made without prior approval by the permitting authority. De minimis changes, on the other hand, will generally require prior approval under a State's minor NSR program. For these reasons, EPA does not accept the suggestion to combine notice-only and de minimis into one category. The Agency acknowledges that the content of the notice should be identical for notice-only and de minimis changes not subject to NSR, and has provided for this. (De minimis changes are discussed further in section 3, which follows this section.)

The EPA also agrees with commenters asking for clarification of which changes are eligible for notice-only procedures. Consequently, the Agency is providing in Appendix B to part 70 a list of Federal rules that are eligible. Appendix B also contains the criteria used by the Agency to decide eligibility for the list. The Agency also recommends that each State develop

a list of its State rules based on these criteria. As new rules are promulgated or existing rules change, EPA will update the Federal list, and suggests that each State also update its list of State rules.

The EPA also agrees with commenters requesting use of the notice-only process to add an alternative operating scenario, provided no source-specific requirements are established. The EPA acknowledges that since alternative operating scenarios typically repeat an applicable requirement that applies to a different operating mode, alternative operating scenarios meet the criteria for notice-only procedures. The Agency also agrees that the notice-only process should be available for adding to the permit title VI requirements that do not involve customization. The Agency also agrees that other methods of submitting the notice may be as reliable as certified mail and has provided for these.

The EPA also agrees with commenters who asked for identification of the requirements under §§ 70.6(a) and (c) which are suitable for generic treatment versus those needing to be specified in the notice. Rather than identifying the requirements suitable for generic treatment, which is a longer list, EPA is identifying below a shorter list of requirements that must be specified in the notice. Part 70 requires the notice to contain these provisions.

Table 1. Requirements of Section 70.6(a) and (c) Which Must Be Specified in the Notice

- 70.7(a)(1)(i) -- Applicable emission limits, standards, and operational requirements.
- 70.7(a)(3)(i) -- Applicable monitoring and test methods, including Compliance Assurance Monitoring and periodic monitoring.[12]

[12]"CAM' refers to the requirements of EPA's proposed "compliance assurance monitoring" program under section 114(a)(3) and title V of the Act. EPA expects to promulgate final requirements for

- o 70.7(a)(3)(ii) and (3)(ii)(A) -- Applicable recordkeeping requirements, including specification of what records must contain.
- o 70.7(c)(3) -- compliance schedule.
- o 70.7(c)(5)(ii) -- A means for monitoring compliance.

The following requirements of § 70.6 are not suitable for generic treatment because they involve source-specific decisions. They are not included in the above list because changes involving source-specific decisions would not be eligible for the notice-only process.

- o 70.7 (a)(1)(iii) -- Alternative SIP limits.
- o 70.7(a)(9)(ii) -- Application of the permit shield to alternate operating scenario.
- o 70.7(a)(10) and (10)(i) thru (iii) -- Terms for emissions trading; whether permit shield applies.
- o 70.7(c)((1) -- Additional testing, monitoring, reporting, and recordkeeping as necessary to assure compliance with permit conditions.

The Agency disagrees, however, that adding identical units could be off-permit and not subject to a notice requirement as suggested by commenters. Without the notice, the Agency believes it will not be clear whether an identical unit is subject to the same requirements as existing "like" units or to other requirements applicable to new like units. The Agency also notes that at least a notice is required under the off-permit provisions of the original part 70. In addition, today's revisions to part 70 eliminate those provisions.

The EPA also disagrees with comments suggesting that exemptions from minor NSR under existing State programs should be off-permit and exempt from notice. The Agency emphasizes that the purpose of title V is to improve compliance with all

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that program in July 1997.

requirements under the Act, including the NSR requirements. Units exempt from NSR in some States are still subject to other requirements such as NSPS or SIP requirements. These requirements deserve the same improvement in compliance that title V should provide to NSR requirements. Moreover, the Agency finds no reason to use exemption from NSR as the overarching criterion for determining permit revision procedures.

In today's revisions, the notice-only process is available for changes that are subject to requirements taken directly from the applicable requirement that do not involve the creation of any source-specific requirements, and that the permitting authority allows without prior approval. A "change" may include a physical change, a change in requirements caused by promulgation of new requirements, or a change in requirements due to a change in the source's circumstances.

"Creation of source-specific requirements" should be interpreted to mean the establishment of any requirement for a particular source beyond those specified in the applicable requirement triggered by the change. These include development of compliance requirements, monitoring parameters, setting monitoring levels for compliance, case-by-case standards or other requirements, and periodic or compliance assurance monitoring. For example, the establishment of parameter ranges for monitoring the performance of a control device, as required under a MACT standard, would not be eligible for notice-only procedures. On the other hand, the adoption into the permit of one or more control options specified in a MACT standard does not create a source-specific requirement, since the control options are established in the standard and are available to any source. Thus, the incorporation of control options would be eligible for the notice-only process. See Appendix B for a list of current Federal rules that EPA has determined are eligible for the notice-only process. Each State should develop a list of current State rules that are eligible based on the Appendix B criteria. Such lists are required to be submitted as part of the operating

permits program.

The notice must identify any existing permit terms that will be removed as part of the notice-only process. This means removal of permit terms that are no longer applicable, such as when a change causes a unit to be subject to a different part of an applicable requirement, and no longer subject to another part of the same applicable requirement. Existing terms are removed by attaching the notice to the permit, similar to the way other processes revise the permit by attachment (e.g., the automatic incorporation of NSR requirements in a merged process).

Part 70 requires that in the notice the source must certify compliance with all applicable requirements that apply to, or are affected by, the change. The purpose of this certification is to help ensure that a source correctly identifies the requirements to which the change is subject. This means that the source will be certifying compliance not only with new or different requirements triggered by the change, but also with existing requirements <u>as modified</u> by the change. Because the change can be made immediately upon submittal of the notice and because there is no prior review by the permitting authority, requiring the source to certify that it has fully identified the requirements that apply to the change is a reasonable safeguard that places responsibility upon the source owner or operator that is commensurate with the flexibility afforded to it under the notice-only process. While it is possible that a source may fail to identify one or more requirements that apply to a change, these requirements are nonetheless applicable, because the absence of a permit shield for the notice-only process means that the source is liable for any violations of applicable requirements to which the change is in fact subject but which are not accurately identified in the notice.

Finally, part 70 places a new condition in the permit content requirements of § 70.6. This new condition requires submittal of a notice for any change made under the notice-only process. This will cause the source in its annual compliance

certification to verify that it has submitted notices for all changes made that are subject to the notice-only process. This should prevent circumvention of the process by making changes without submitting a notice.

4. De Minimis Permit Revisions

a. Summary of the Proposal on the De Minimis Category

In August 1995, EPA proposed to allow States to create a category of de minimis changes as a subcategory of LES changes. The proposal would have allowed de minimis changes to be excluded from public review, EPA review and objection opportunity, and citizen petition if the State's revised program could show that subjecting these changes to those provisions would provide a benefit of trivial value. The proposal required that the State's de minimis demonstration would need to be approved by EPA.

The proposal gave several criteria for States to use in establishing the de minimis category. These included an area's air quality, the emissions impact of de minimis changes, the nature of air pollution controls that apply to de minimis changes, and a State's prior experience regarding the public's interest in permitting the types of changes proposed for the de minimis category. The Agency solicited comment on these as well as other factors that States should consider in determining the scope of the de minimis category. The EPA expected that de minimis categories might justifiably differ from State to State, based on the States' different circumstances, requirements, and experiences.

b. Summary of Comments on the De Minimis Category

Most commenters supported the idea of allowing States to designate categories of de minimis changes that would be exempt under part 70 from public and EPA review and citizen petition. But an environmental commenter questioned EPA's authority to provide less than full prior notice and comment for any permit revision except very trivial changes. The commenter could support the idea if EPA would review each State's public participation provisions after 5 years and provide the public an

opportunity to comment on whether EPA should extend the initial approval or require changes based on the experience of the first 5 years. The commenter also urged EPA to preserve EPA review and citizen petition opportunity for de minimis changes proposed by a State and approved by EPA under a catchall authority. (See proposed § 70.7(f)(2)(v)(A)(6) of the August 1995 notice.)

Many industry commenters and some regulatory agencies supported the de minimis concept, but they opposed requiring EPA approval for changes currently exempt from public review under State NSR programs if a State designates them as de minimis for purposes of part 70. They believe that it serves no useful purpose to require States to re-justify de minimis or insignificant emission levels. Others argued that requiring States to justify de minimis categories consistent with Alabama Power is burdensome. Some industry commenters urged EPA to require States to establish de minimis categories for part 70 by providing that States "shall" rather than "may" establish a de minimis category.

Two regulatory agencies suggested that EPA should leave the development of criteria for State de minimis categories to the permitting authorities, rather than establish national criteria. However, several other agencies asked EPA to provide more guidance for State de minimis demonstrations, and one agency asked EPA to establish national de minimis levels, or at least set national criteria for State de minimis demonstrations, to promote consistency among States.

Some commenters suggested the following criteria in addition to those EPA had proposed:

- The compliance history of an industry sector;
- The cost to permitting agencies for processing and reviewing versus the environmental benefit;
- How long the source has been permitted, as an indicator of how well informed the company would be regarding the State's rules;
- Whether the change involves nontraditional technology

or new regulations;

- o The proximity of a particular change to the threshold for the significant permit revision (MES) category;
- o Whether the change involves the use of a historically reliable control system; and
- o Whether the change is subject to objective and well-defined standards versus case-by-case determinations.

In addition, several commenters sought clarification of the criteria from the August 1995 proposal. One questioned EPA's proposal that air quality should be the most important factor. Another wanted EPA to clarify that "unfamiliar" control technologies should be construed as unfamiliar to the permitting authority, rather than unfamiliar to the public.

c. Discussion of the De Minimis Category

Regarding the comment that EPA should limit its approval of de minimis exemptions to 5 years then review and extend the approval if appropriate, the Agency believes that this should be unnecessary for several reasons. First, the de minimis determinations will be subject to notice and comment during adoption by the permitting authority and again during EPA's approval of the State program revision. During these public comment opportunities, the public could submit comments on the proposed de minimis categories. Also during approval of a State program, the Agency reserves the right to ask a State to revise its program to address issues raised in citizen comments. Second, and more important, the revised part 70 gives more definite guidance that should induce States to establish appropriate de minimis categories, which should lessen the need for EPA to review its initial approval after 5 years. Finally, the Agency acknowledges that new information becoming available after initial approval could call into question the original de minimis levels. Therefore, EPA notes that any person may petition EPA to conduct further rulemaking on de minimis exemptions if he or she believes that operation of an approved State program shows that revisions to the program are

appropriate. Alternatively, a citizen may request the State to revise its program to address deficiencies.

As to whether EPA may accept categories currently exempt from public review under state NSR programs as de minimis under part 70, EPA disagrees. Instead, EPA believes that States must submit de minimis demonstrations for EPA approval. First and most important, there is little evidence that States ever demonstrated that the exemptions from public review under their NSR programs are de minimis under the Alabama Power standard. That standard is the only permissible way to avoid the public and EPA review required under title V. Also, most exemptions from public review were created in the original SIP's over 20 years ago. The exemptions never considered that minor NSR permits would one day create "synthetic minor" status or provide reductions for netting following the Alabama Power decision. The EPA would consider neither of these actions eligible for the de minimis category. In addition, the public's interest in air pollution issues has shifted to include environmental justice and concerns about HAPs, which also were not considered when the current exemptions from public review were adopted. Finally, the exemptions did not account for title V's emphasis on public participation and improved compliance.

In response to the comment that the de minimis demonstration would be burdensome, the Agency does not agree that this is always true or a reason for avoiding the demonstration. The de minimis demonstration may not be burdensome at all where the air pollution problem is minimal. The comment implies, however, that EPA should provide simple and easy-to-implement criteria regardless of the severity and complexity of the air pollution problem. The Agency agrees that simplicity is a laudable goal to be applied once the criteria are selected. The criteria themselves, however, must be consistent with and evolve from the de minimis standard of Alabama Power.

The EPA does not agree that the criteria EPA has adopted are overly burdensome. The part 70 regulations and preamble provide

States several ways to base their demonstration on work that EPA has already done. For example, to demonstrate that changes are de minimis because they involve little or no judgment, States may compare their rules to EPA's list of federally-promulgated rules eligible for the notice-only process. If a State finds changes on the list that are substantially similar to changes subject to the State's NSR program or SIP, it may conclude that the level of judgment involved is minimal. For example, suppose a State shows that RACT rules for storage tanks in the SIP would be substantially similar to NSPS standards for storage tanks on EPA's notice-only list. This showing would be sufficient to support a State's demonstration that changes subject to the RACT rule are de minimis.

In addition, EPA is offering States the option of "presumptive" de minimis threshold levels, in lieu of a demonstration supporting a State-specific de minimis threshold. In EPA's view, levels at 25 percent of the significance levels for major PSD or NSR can be considered de minimis in many circumstances, given the statutory purposes of public participation and EPA and citizen review under title V. (By "significance levels," EPA means the levels at which a modification would be a major modification under PSD or NSR requirements.[13])

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[13]The significance levels were originally adopted after notice and comment in 1980 in response to the Alabama Power decision, which required EPA to set levels below which PSD and NSR requirements for major modifications under the 1977 Amendments would not apply. For example, the significance level for VOC, SO_2 and NO_x is 40 ton/yr in attainment and most ozone nonattainment areas, which means that any project which increases net potential emissions by at least 40 ton/year is a "major modification." [See 40 CFR 51.165(a)(1)(x) for nonattainment NSR and § 51.166(b)(23) for PSD.] In the 1990 Amendments, Congress lowered the significance levels for serious and severe ozone nonattainment areas to 25 ton/yr and applied it accumulatively, so that a project would be a major modification if net emissions from the project, plus net emissions from the previous 5 years, exceed 25 ton/yr. [See section 182(c)(6).] All significance levels are on a PTE basis. In extreme ozone nonattainment areas, any increase is a major modification, so the

Because EPA considered the impact on air quality from cumulative de minimis changes and the impact on Class I areas in setting the significance levels, a State using 25 percent of significance levels need not demonstrate that these levels are de minimis with respect to these factors. (The same holds if the State sets a level more stringent than 25 percent.)

The EPA also believes that transport of VOC and NO_x emissions would also have only a trivial impact. This is because the presumptive levels are only 25 percent of the significance levels, which themselves were shown to have a trivial impact on nonattainment or increment consumption in a typical city when EPA published the original significance levels. [See 45 FR 52676, August 7, 1980.] Since the impact on downwind transport is always less than the local impact, it follows that the impact on nonattainment at downwind locations would also be trivial. Thus, States need not demonstrate a trivial impact on downwind areas from de minimis changes at or below the presumptive levels.

For similar reasons, EPA believes the impact of de minimis levels of PM-10 emissions on downwind PM-10 is also trivial. The

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significance level is effectively zero.

The significance levels reflect EPA's judgement about what levels of emissions can be considered de minimis under PSD and major NSR, given the purposes of those programs. In setting the significance levels, EPA considered the cumulative effect on increment consumption of multiple sources each making de minimis changes. Based on modeling of source distributions in a typical industrialized city, EPA decided to use four percent of the 24-hour primary standard for PM and SO_2 as a design value, which corresponds to 25 tons/yr for PM and 40 ton/year for SO_2. The modeling indicated that in most industrialized areas, excessive increment consumption is unlikely, because source impacts are localized and because temporal and spatial conditions which lead to maximum concentrations for one source are seldom the same for another source making de minimis changes. For NO_x, two percent of the annual standard was chosen, and the significance level for VOC was set equal to NO_x because of the role both pollutants play in the formation of ozone. The EPA also considered the effect of de minimis changes on Class I areas, and to protect these areas, required a source locating within 10 km of a Class I area to show that its impact would be less than 1 μg in order to be considered de minimis.

modeling of the PM significance levels, and the subsequent analysis when the PM-10 significance level was added, indicated a trivial impact from changes at the significance level. Since these presumptive de minimis levels are only 25 percent of the significance levels, the impact on the local nonattainment problem is also trivial. Furthermore, since in general only the fine particles are transported more than a day from the point of discharge, the impact on downwind areas would be less than the local impact, and hence also trivial. Because EPA has proposed a fine-particle NAAQS, however, this conclusion should not be read to apply to fine particles, which can be transported over long distances and are subject to atmospheric reactions involving the conversion of gaseous pollutants to particles. Moreover, the PM-10 significance level may need to be revised if EPA promulgates a fine-particle standard.

The impact of changes at the presumptive de minimis levels is also not sufficient, in EPA's view, to cause a substantial effect on acid rain or visibility. Concerning acid rain, the levels would have no effect on compliance of power plants and other affected sources with requirements of the acid rain program. As for visibility, the concern is mostly with impacts from large urban areas such as Los Angeles, or power plants in the Ohio valley, on Class I areas. In EPA's view it is likely that emissions at de minimis levels, even when aggregated over an urban area, would not cause a discernible impact on visibility. Consequently, States need not demonstrate trivial impact of presumptive levels on acid rain or visibility.

The EPA also expects States to respond to significant issues raised in the public comment period that question the appropriateness of the presumptive exemption for the area. When reviewing a State program, EPA reserves the right to ask the State to revise its program to address issues raised in citizen comments related to the use of the presumptive level.

A State may always set higher de minimis thresholds than the 25 percent level, if they demonstrate that the higher thresholds

are de minimis given the characteristics of the area within the State's jurisdiction. This demonstration must meet the criteria in § 70.3(e)(3)(iii).

The Agency's justification for 25 percent of the PSD significance levels is that (1) it is a small percentage of the major source levels at which major NSR and PSD apply (e.g., 25 percent of significance corresponds to 10 percent of major source threshold for pollutants with significance levels of 40 tpy and major source thresholds at 100 tpy); (2) it is a relatively small fraction of the significance levels at which NSR or PSD requirements for major modifications apply; (3) the significance levels themselves were determined by EPA to have minimal impact on ambient standards or increment consumption, even if a series of changes at these levels were made; (4) they do not include synthetic minor sources, since today's revisions exclude synthetic minor limits from the de minimis category; and (5) units of this size are often subject to categorical rules adopted after public comment and EPA review, rather than case-by-case determinations.

The presumptive de minimis levels for different areas and different pollutants (except HAPs) are listed in the table below.

De Minimis Levels at 25 Percent of Significance Levels

Pollutant	**Significance level, tpy (PTE)**	**25 percent of significance level (to nearest tpy) (PTE)**
Carbon monoxide	100	25
Sulfur dioxide (SO_2)	40	10
Oxides of nitrogen (NO_x) in attainment areas (and ozone nonattainment areas where EPA has granted a section 182(f) waiver)	40	10

Volatile organic compounds (VOCs) and in attainment areas and moderate ozone nonattainment areas	40	10
VOCs and NO_x[14] in serious and severe ozone nonattainment areas	greater than 25 tpy over 5 years	6 (see discussion)
VOCs and NO_x in extreme ozone nonattainment areas	0	0
Particulate matter (PM)	25	6
Particulate matter less than 10 microns (PM-10)	15	4
H_2S, TRS	10	3
Others (lead, asbestos, beryllium, mercury, vinyl chloride, fluorides)	.004 - 3 tpy (Varies by pollutant)	0-1

For HAPs, part 70 specifies which permit revision procedures must be followed if the change is subject to applicable section 112 requirements. For example, changes involving section 112(g), (j), (i)(5), and (l) are required to use the significant permit revision process, and cannot be de minimis. Consequently, EPA did not set a presumptive de minimis level for HAPs. States are free to establish HAPs cutoffs, however. For example, a State may want to require public review for any change emitting HAPs because of public concern over toxic emissions. It could implement this policy by setting a de minimis cutoff for HAPs, e.g., a percentage of the major source thresholds under section 112. Changes that might be de minimis because they were below 25 percent of significance levels would then be subject to public

[14]Does not apply to NO_x where EPA has granted a waiver under section 182(f).

review if they were above the cutoff level for HAPs.

States may include in the de minimis category changes to parameter ranges required under MACT standards, if the new ranges are established using EPA-approved test methods specified in the MACT standard. The same applies to changes to indicator ranges required by a CAM plan. Changes to the indicator ranges may be de minimis if the new ranges are established using the test method specified in the CAM plan. Using a different test method than the one required in the MACT standard or the CAM plan would not be de minimis. Changing the parameter specified by the MACT standard or the indicator specified in the CAM plan itself would not be de minimis either.

The EPA agrees with commenters urging the Agency to provide additional guidelines or criteria for State de minimis demonstrations. The Agency is concerned that, without specific criteria, States will be uncertain as to what sort of demonstration EPA could approve as consistent with Alabama Power. Also, some criteria may be inappropriate and the Agency wants to direct States to suitable criteria at the outset. For these reasons, EPA is setting forth criteria in § 70.7(e)(3)(iii) that a State must use for State-specific de minimis categories. State-specific de minimis exemptions must be supported by a record that demonstrates that the criteria in § 70.7(e)(3)(iii) are met.

The EPA had proposed that a de minimis cutoff could be based solely on the fact that emissions from changes below a cutoff level were substantially less than emissions from changes above the level. The New Jersey Department of Environmental Protection analyzed permits issued under its NSR program over a 2-year period. The Department found that 90 percent of the emissions from all NSR actions came from modifications of about 5 tpy and below. (See docket item IV-D-100) The proposal suggested that other States could set de minimis cutoffs based on their NSR permitting data, using a similar analysis.

Upon reconsideration, however, EPA has not included this

approach in the criteria for the revised part 70. The Agency believes it is necessary to focus on whether changes at or below the chosen de minimis cutoff have a trivial environmental impact, or involve minimal judgment. Both of these factors are more relevant to the de minimis standard of Alabama Power.

Concerning criteria suggested by commenters, one commenter suggested using the compliance history of a sector. This comment suggests that permit revisions for companies with good compliance records should be exempt from review because it would yield a trivial benefit, or that, conversely, revisions for companies with poor compliance histories should not be de minimis. Yet, a record of good past compliance is not directly related to whether providing public review of current permit revisions is beneficial. Also, compliance history is not indicative of a source's ability to identify and properly incorporate requirements and revisions of requirements. For example, in preparing their part 70 permit applications, States and sources discovered that a number of companies had made changes at their facilities without complying with NSR or NSPS requirements. This "noncompliance" was not caught at the time, and would not have been reflected in past compliance reports. Consequently, the Agency disagrees that compliance history is a proper criterion.

Another commenter suggested comparing the cost of processing and providing review to the environmental benefit. However, the standard for de minimis exemption is whether public review would yield a benefit of trivial value, not whether the cost outweighs the benefit. Under the commenter's approach, the change would be considered de minimis whenever the costs outweigh the benefits. Under Alabama Power, however, the benefit of public and EPA review must be shown to be trivial. In addition, to balance costs and benefits properly, the approach would require a way to assign dollar amounts to the benefits of public and EPA review, which historically has been difficult if not impossible. For example, what is the benefit in dollars of public comments suggesting that monitoring requirements in a permit be improved

to determine compliance with an NSPS standard? Consequently, EPA disagrees with the cost/benefit test as a criterion.

Another commenter suggested that the familiarity of a source with a State's rules, as indicated by how long it had been permitted, could be a criterion. This suggests that firms operating under a permit the longest would make few errors in identifying applicable requirements, but those recently permitted would be error-prone. The Agency has no information whether or not this is true, and the commenter did not supply any. As to the merits of the concept, EPA believes a more relevant indicator of possible errors is the level of judgment involved when incorporating applicable requirements into the permit. That does not depend on how long a company has been permitted. If a change requires substantial judgement, then the potential environmental impact criterion may be used, which again does not turn on the company's permit history. If a change cannot be shown to be de minimis based on either of those two criteria, then it's not de minimis no matter how long the company has been permitted.

Another commenter suggested a criterion of whether the change uses nontraditional control technology or involves new regulations. (The commenter did not define "nontraditional technology.") This comment suggests that permit revisions involving innovative technology or newly-adopted regulations would always benefit from public and EPA review, and thus it should be required. However, the Agency would not agree that new regulations, per se, should be excluded from the de minimis category. For example, the notice-only provisions of today's part 70 revisions allow eligible changes which trigger new requirements to be processed without public or EPA review, primarily because minimal judgment is needed to incorporate the requirements. In addition, the comment suggests that permit revisions involving traditional technology or subject to existing regulations would not benefit from review, and therefore should be de minimis. Again, EPA does not agree that all traditional technology or existing regulations should be exempt from public

and EPA review. Incorporating some traditional requirements into the permit will no doubt require the addition of monitoring requiring significant judgement, and these should not be de minimis. The EPA believes that the level of judgement involved is more appropriate than whether the technology used is traditional or nontraditional.

Also suggested as a criterion was the proximity of a change to a threshold for the MES category (i.e., significant permit revision). This comment suggests that changes could be de minimis, for example, if they were less than some percentage of a significant permit revision threshold. The EPA has essentially relied on this type of criterion to establish the presumptive 25 percent of significance levels. Thus, EPA would allow States to use this criterion, if the proximity were set at a level comparable to EPA's 25 percent of significance levels.

Another commenter suggested a criterion based on the use of historically reliable controls. In other words, changes using reliable control technology should be exempt from public and EPA review because the technology rarely breaks down or malfunctions. Although this suggestion sounds promising, EPA believes additional factors need consideration. For one, emission levels depend on the variability of processes, in addition to the reliability of control devices. Also, reliable control devices may still require additional monitoring under the CAM rule, and this suggestion may be better directed to that rule. Moreover, EPA believes that the level of judgment criterion incorporates the commenter's idea. If a control is indeed reliable, then it may require less frequent, and perhaps simpler monitoring than if it were not reliable. If the less frequent and simpler monitoring involves little judgment, it may be eligible for de minimis. If on the other hand it involves substantial judgment, then it should not be de minimis, even if the controls seem "reliable."

Finally, a commenter suggested a criterion based on whether the change is subject to objective and well-defined standards

versus case-by-case determinations. The EPA agrees that if case-by-case determinations are needed, this typically defines that a trivial level of judgment is not involved. Therefore, this idea is already incorporated in the criteria in today's revisions.

Since some commenters seemed uncertain as to what requirements would apply to de minimis changes, it is important to clarify that they would be exempt from the opportunity for public comment and a hearing, EPA review and objection opportunity, and citizen petition. De minimis changes are not exempt from the requirement to obtain a preconstruction permit or a part 70 permit revision, if these requirements apply. Permitting authorities must give public notice of all de minimis changes. The notice can occur up to 3 months after permit revision and can cover multiple de minimis actions.

The EPA expects that the de minimis category will be used primarily to exempt smaller minor NSR actions or those subject to categorical rules from the public review requirements of NSR and part 70, and the EPA objection opportunity and citizen petition requirements of part 70. Minor NSR actions categorically precluded from being treated as de minimis are those that are required to obtain significant permit revisions, for example, major netouts, plantwide applicability limits (PALs), and changes subject to sections 112(g) or 112(j). Also precluded are those prohibited from the de minimis category by part 70 (i.e., nonmajor netouts and PTE limits to avoid major source requirements). These must be included in the minor permit revision category.

Today's revisions to § 51.160 and § 51.161 require public participation requirements for NSR actions that are consistent with those required for part 70 sources. A de minimis change at a part 70 source would be exempt from public review under part 70 and part 51. Likewise, a de minimis change at a non-part 70 source would be exempt from public review under part 51.

In summary, today's revisions specify two criteria by which States may justify changes as de minimis and therefore exempt

from public review under part 70 and part 51, and from EPA review and objection and citizen petition under part 70. The first criterion is whether little or no judgment is required. For part 70, the focus is whether there is little or no judgment needed to incorporate the applicable requirements into the part 70 permit or to assure compliance. For part 51, the focus is whether there is little or no judgment needed to establish requirements of the NSR permit. The second criterion is whether the environmental impact is trivial. The focus of this criterion is the same for part 51 and part 70. The State may justify de minimis changes on the basis of either or both of these criteria.

Changes that would qualify as de minimis on the basis of minimal judgment must be described with exactness in the State rules. For instance, it would not be acceptable for State rules to include in a de minimis category "changes that involve a minimum level of judgment." This would require judgment about which changes involve a significant level of judgment, and so would undermine any possible rationale for approval. Under this de minimis test, it is important that EPA or anyone else evaluating the part 70 or NSR program be able to determine on the face of the State regulations whether the types of changes eligible for de minimis treatment in fact require no more than a trivial level of judgment. States should demonstrate that de minimis changes can in fact be incorporated into the part 70 permit without the need to establish monitoring or other requirements for assuring compliance with applicable requirements. If monitoring or other requirements must be established in the part 70 permit, the State must show that they can be created with a minimal amount of judgment. For de minimis changes subject to NSR, States must show that the terms and conditions of the NSR permit can be created with a minimal amount of judgment.

Below are examples of monitoring that EPA believes entail minimal judgment:

o Recordkeeping of VOC content of coatings for compliance

with a VOC content (lb/gal) limitation;

- Records of the use or integrity of passive control devices, such as seals, lids or roofs; use of low-polluting fuel or feedstocks; and use of combustion design features or characteristics;
- Fugitive dust control measures, such as watering of roads;
- Records of inspection, maintenance, and repair;
- Records of pollution prevention measures;
- Records of proper operation of process, such as ensuring lids of vapor degreasers are in place;

Additional examples or guidance may be forthcoming in the CAM regulations or in future EPA guidance.

Below are examples of NSR requirements that EPA believes entail minimal or no judgment:

- Rules applicable to source categories, such as VOC limits on surface coating operations;
- Generic rules, such as opacity limits, process weight curves, or SIP prohibitions against violating NAAQS;
- Approvals to construct, where the approval establishes no new requirements;
- Registrations for the purpose of keeping track of equipment and its emissions;[15]

To justify that changes are de minimis based on trivial environmental impact, the permitting authority needs to demonstrate that: (1) any de minimis cutoff level proposed by the State is substantially below applicable major source thresholds and well below applicable significance levels at which PSD or nonattainment NSR for major sources or major modifications apply; and (2) the ambient environmental impact of de minimis changes is trivial based on the factors given in the next paragraph.

[15]Registrations need not require permit revisions at all if the permit contains a generic requirement to meet the registration requirements under the SIP.

Concerning ambient impact, the permitting authority needs to demonstrate that the impact is trivial with respect to all of the following considerations that are relevant:

- The ability of attainment areas to remain attainment, and the ability of nonattainment areas to achieve attainment status;
- The effect on consumption of increments under PSD;
- The impact on Class I areas; and
- The impact of de minimis changes on areas of special concern such as schools, hospitals, or areas with sources in which the public has expressed a desire to participate in permit decisions.

Instead of a State-developed cutoff for de minimis changes, the State may use EPA's presumptive level of 25 percent of relevant PSD/NSR significance levels. States using the presumptive 25 percent level need not show that ambient impacts are trivial with respect to: (1) attainment and nonattainment areas; (2) consumption of increments under PSD; or (3) impact on Class I areas. However, the State must show that the impact is trivial on areas of special concern to the public or areas where the public has expressed a desire to participate in permit decisions.

The August 1995 notice established the LES category, which included all changes not in the MES category. The proposal further provided that a subset of LES changes could, subject to EPA approval, be included in a de minimis category for which no public or EPA review or citizen petition would be required. Today's action establishes de minimis permit revisions not as a subset of minor permit revisions, but as a separate category; part of the "expedited permit revisions" which are at the lowest step in the revision hierarchy. It is therefore appropriate to discuss which minor permit revisions cannot be considered de minimis and included in the de minimis category.

As discussed in the August 1995 preamble (60 FR 45537), the Agency considered including synthetic minor limits in the MES

category and did propose that all netouts be MES changes. As discussed subsequently, in today's revision to part 70 only those netouts for which the increase (before netting) would be at or above the major source cutoff are being classified as significant permit revisions. All other netouts (herein referred to as "the less significant netouts") would be lower level permit revisions. However, because netouts are significant increases (before considering netting) and would be subject to major NSR or PSD if done improperly, the Agency is prohibiting permitting authorities from classifying any netout as de minimis.

Another category of changes that permitting authorities may not classify as de minimis are plantwide limits on the PTE to avoid major source requirements (also referred to as "synthetic minor limitations"). Since public and EPA review of PTE limits may help establish more effective PTE limits, these changes may not be considered de minimis.

D. Minor Permit Revisions

1. EPA Objection Authority

a. Summary of the Proposal on EPA Objection Authority

In the August 1995 notice, EPA proposed to waive, except in response to a citizen petition, its authority under section 505(b) to object to a permit revision for changes in the LES (minor permit revisions in today's notice) category. The waiver would take effect State-by-State whenever EPA approved a revised part 70 program and would last for 5 years. At the end of the 5 years, EPA would either extend the waiver or reinstate its objection authority based on a review of the State's performance during the first 5 years. Regulatory language proposing to waive EPA's objection authority for 5 years except in response to a citizen petition was included in § 70.8(c)(5) of the August 1995 proposal. The Agency solicited comment on its legal authority to limit its objection authority in this way.

b. Summary of Comments on EPA Objection Authority

An environmental group objected to EPA's proposed waiver of its objection authority, on the grounds that section 505 of the

Act prohibits such a waiver for any major source, and consequently, EPA may not waive its rights for review. However, several industry commenters supported EPA's proposed waiver, principally on three grounds. The first is that, although the Act requires EPA to object to improper permits, it imposes no time frame for EPA's review, and as a result EPA may defer its objection period until permit renewal. The second is that, while section 505 gives EPA the authority and an opportunity, it does not give the Agency a mandate to review every permit revision; thus EPA may waive review of some revisions. The third is that the Act's prohibition on waiving the objection opportunity for major sources should be read to mean "major modifications" subject to major NSR, which supports EPA's proposal to waive its objection opportunity for minor modifications at major sources.

c. Discussion on EPA Objection Authority

The EPA finds the comments of the environmental group to be compelling regarding EPA's lack of statutory authority to waive its objection rights. The Agency agrees that the plain reading of the Act does not allow EPA to waive altogether its objection authority under section 505(b)(1) for major sources, or to defer its exercise of that authority until permit renewal. Just as important, EPA is not persuaded by the arguments from industry commenters, none of whom pointed to a clear statutory basis for EPA's proposed waiver.

First, subsections (a) and (b) of section 505, the requirements of which EPA may not waive for major sources, do impose time frames for EPA's review; thus, EPA has concluded that it may not defer its objection period until permit renewal. Second, EPA agrees with the commenter who observed that the Act does not require the Agency to review every permit revision. The Act does, however, require the Agency to have the legal authority and opportunity to object to permits determined as not in compliance with applicable requirements. Waiver of EPA's authority and opportunity to object except in response to citizen petitions, for 5 years, would render the Act's objection

requirements ineffective. Finally, EPA does not agree that section 505's prohibition on waiving the objection opportunity for "major sources" should be read to mean simply "major modifications" subject to major NSR.

Accordingly, to adopt a position consistent with the statute, today's part 70 revisions do not waive EPA's authority to object to permit revisions in the minor permit revision category. Consequently, States must provide an EPA review period for minor permit revisions and opportunity for objection consistent with today's part 70 refvisions.

At the same time, EPA recognizes the need to reduce where possible the length of the permit revision process, especially for permit revisions that are less significant. Where neither EPA nor the public submit comments adversely on minor permit revisions by the end of the public comment period, EPA may be deemed to have completed its review and determined not to object to the proposed permit. In such circumstances, there is no reason for EPA's review period to last a full 45 days. Likewise, even where adverse comments are submitted, EPA may complete its review prior to the end of the 45 days.

Thus, for minor permit revisions, EPA will reduce its review period as follows: if the public has not commented adversely by the end of the public comment period, and EPA itself has not commented adversely, EPA review is deemed to be completed at the end of the public comment period. If EPA or the public has commented adversely during the public comment period, then EPA's review period will remain 45 days, except that EPA in its discretion may complete its review by giving written notice to the permitting authority and anyone who commented that it does not object to the permit revision.

The notice for public comment on minor permit revisions would state that the EPA review period would be shortened if neither the public nor EPA comments adversely during the public comment period, or if EPA decides to complete its review through written notice prior to the end of the 45-day review period. The

notice would also state that under these circumstances the deadline for submittal of a citizen petition would move up accordingly. In other words, if EPA completes its review by the end of the public comment period, or at some later time through written notice prior to the end of the 45-day review period, any person may petition EPA within 60 days after the completion of EPA's review, consistent with § 70.8(d). The 60-day period for public petition begins from the time that the permitting authority provides notice to the public of the advanced citizen petition deadline, unless such notification occurs after the end of EPA's 45-day review period, in which case the 60-day petition period begins at the expiration of the 45-day review period. The permitting authority is required to provide notice to the public through a telephone hotline, computer bulletin board, or other means, if EPA's review is shortened, or if the deadline for filing a citizen petition is moved up.

2. Public Comment Opportunity

a. Summary of the proposal on Public Comment Opportunity

In the August 1995 notice, EPA proposed to allow States to vary the timing and amount of public review for the changes in the LES category (minor permit revisions in today's notice). States were required to provide an "adequate amount of public review" for LES changes that were not de minimis; however, part 70 did not specify a minimum amount of public comment nor place limits on the timing of the public comment.

The preamble stated that States should provide more comment opportunity for the more significant LES changes. In the preamble discussions for revisions to both part 51 and part 70, EPA said that it expected States to provide a substantial opportunity for prior public review for significant changes to PTE limits or caps. (See 60 FR 45541, col.1 and 45549, col. 1.) States were urged to consider several factors in deciding which PTE limits were "significant." These factors, listed on page 45537, were: (1) the size of the source or modification before the synthetic minor control is applied; (2) the use of synthetic

minor controls to reduce PTE to just below the major source thresholds; and (3) whether the synthetic minor limit relied on technology or measures whose effect on emissions was not well understood or easily established. In addition, for part 70, EPA mentioned that it would provide guidance for when States should provide public or EPA review for significant decisions regarding MACT applicability or compliance parameters. (See 60 FR 45541, col. 1-2.)

b. Comments Received on Public Comment Opportunity

Most commenters supported the proposed approach of varying the amount and type of public comment with the significance of the change. Many industry commenters suggested that the States' current procedures for minor NSR should satisfy Title V's public process requirements, and added that most minor NSR changes do not merit prior public review, or any public review at all. Other industry commenters supported after-the-fact notice and comment periods for minor changes, based on their view that the public rarely comments on minor NSR changes. Other commenters suggested that public review for minor changes could be delayed until renewal of the part 70 permit. Another commenter suggested that public review should be provided based on the contribution by stationary sources to the overall emission inventory.

One regulatory agency suggested the need to better develop the public review provision, to reduce any additional burden on permit authorities. Other agencies commented that EPA had not provided sufficient guidance of the types of changes needed to State NSR programs. Another regulatory agency commenter suggested that EPA allow States to provide public comment on the application, rather than the permit, which is allowed in some State minor NSR programs.

One environmental group suggested that the proposed concept was an experiment that it could accept only if the Agency reviewed each State's public comment procedures after the first 5 years of operation and decided whether to extend the approval or require changes. The commmenter also questioned EPA's legal

authority for allowing less than full prior public notice and comment.

c. Response to Comments on Public Comment Opportunity

As an initial matter, EPA agrees with commenters that additional guidance would help States know what EPA would approve regarding the amount and timing of public review, and would reduce inconsistencies among State programs. The Agency, however, disagrees with commenters who suggested various ways of avoiding public review, by delaying it until renewal, for example. Such methods do not provide public review for permit revisions. The Agency also disagrees that it should accept the public review procedures of current State minor NSR programs as adequate. Some programs may provide adequate public review for some changes, but few provide review that is adequate to meet title V requirements. In addition, as noted in the August 1994 preamble, many such programs lack the public review requirements applicable to minor NSR programs under part 51. (See 59 FR 44478, col. 3.)

Section 502(b)(6) requires that States provide "adequate, streamlined and reasonable" procedures for permit revisions, including public review. The EPA believes that this requirement is best met if States are required to provide a minimum amount of time for public comment. The Agency believes this period should be adequate and reasonable. Historically, this minimum public comment period has been 30 days; however, since the minor permit revisions in question are of less significance, EPA is establishing a minimum 21-day public comment period for minor permit revisions. In the Agency's view, a 21-day period can be an adequate amount of time for the public to receive information about the proposed permit revision, review it, and submit comments to the permitting authority.

In addition, as discussed previously, EPA has decided not to waive its objection authority for minor permit revisions, which will require States to provide 45 days for EPA review. A 21-day public review period can easily be fit within the 45-day EPA

review period, without delaying final action on the minor permit revision. However, as discussed earlier, EPA believes that it should reduce its review period for minor permit revisions if neither the public nor EPA adversely comment during the public comment period. For this approach to work effectively, both the public and EPA must have an adequate period in which to comment, or decide not to comment, on minor permit revisions. A 21-day period is the least amount of time EPA believes appropriate for this task.

E. Significant Permit Revisions

1. Netouts

a. Summary of the Proposal on Netouts

In the August 1995 notice, one of the revisions proposed for the MES category would be a physical change or change in the method of operation that is not subject to major NSR or PSD because the net emissions increases result from the change were below the significance levels for major NSR or PSD. Such a change was referred to as a "netout." As proposed, a netout would be a physical change or change in the method of operation that would be subject to major NSR or PSD because the emissions increase from the proposed change would have exceeded the significance level, but where consideration of contemporaneous emissions reductions at the source cause the net emissions increase to fall below the significance level. The proposal intended that these netouts would be governed by rules of the NSR program applicable to netting, so that any project considered subject to "netting" under NSR would be considered a netout for part 70 purposes. The NSR rules require, for example, that emissions decreases used in the netting calculations take into account all emission increases and decreases that have occurred at the plant within the "contemporaneous period" (generally, the past 5 years), and that the emission increases from the project must include all increases elsewhere at the plant (so-called "de-bottlenecking" increases) that result from the physical change or change in method of operation.

b. Summary of Comments on Netouts

Numerous and varied comments were received from industry opposing the proposal to include all netouts in the MES category. In summary, their principal comments were that: (1) EPA did not justify why netouts needed the full permit revision process; (2) the process would be unduly burdensome; (3) any problems with netouts would and should be handled in the NSR process, rather than the part 70 process; and (4) not all netouts deserve full review and, therefore, the less significant ones should be exempt from the MES category. In addition, comments alleged that public review is not necessary because the public does not have the expertise to judge netout calculations, especially in serious and severe nonattainment areas where the significance levels are lower and where individual changes are accumulated for comparison to the significance level. Commenters also claimed that processing netouts as MES changes will reduce incentives for sources to reduce emissions and discourage modernization projects, and sometimes cause net decreases in emissions to be delayed.

An environmental group supported without qualification the proposal to include all netouts in the MES category. Several regulatory agencies supported the idea that netouts are environmentally significant, but objected to including small units subject to the de minimis rule of section 182(c)(6) of the Act.

c. Discussion of Netouts

Concerning the comment that EPA did not justify the inclusion of netouts in the MES category, EPA's view is that commenters misread the task facing EPA. As explained in the proposal, EPA must justify not placing netouts (and all other classes of changes) in the MES category, because title V presumptively requires public review, EPA objection opportunity, and citizen petition for all types of permit revisions. Legally speaking, the Agency must show why subjecting some types of changes to this process would yield a benefit of trivial value,

within the meaning of Alabama Power, not why other types of changes are of such significance that public review is beneficial. The EPA proposed to implement this concept using the theory of environmental significance, meaning that LES types of permit revisions can be required to undergo less process, and the least significant ones can be exempted altogether from process requirements.

The EPA notes that the proposal supported not exempting netouts from process requirements on the grounds that they involve the most complicated analyses undertaken by permitting authorities, and that they are among the most important decisions permitting authorities make, since they shield changes with significant emission increases from the control requirements of major NSR. Experience shows that netting done improperly results in large emission increases without sufficient offsetting decreases, such that the net increase is actually a significant change and subject to major NSR or PSD requirements. The EPA's past review of State permits has disclosed many instances in which a change that appeared to have insignificant net emissions turned out after EPA review to be significant and subject to major NSR. Examples of such problems include incorrect calculation of the emission increases resulting from a modification project, taking credit for emission reductions that were not eligible because they had been credited against an earlier netting project, and failing to account for other emission increases that occurred contemporaneously with the proposed project. These problems are indeed serious, since they indicate that some projects should have been subject to major NSR, and would have been if the correct netting procedures had been followed. Letters to several State agencies documenting EPA's review are included in the docket to this rulemaking.

As for comments suggesting that EPA should rely on existing State NSR processes to detect and correct errors in netting, to the extent those existing programs provide no public or EPA review, EPA believes it is unlikely that errors would be detected

through the same process that generated them, except through enforcement actions generated by a review of the netting calculations. It appears to EPA that a prior review of the calculations by the public and EPA, with the opportunity for correction of any errors found, would necessarily be more reliable than depending on detection by a State NSR program that lacks public or EPA input, as the commenter seems to suggests. The EPA also points out that today's rulemaking makes the public review requirements for NSR programs in § 51.161 consistent with public review requirements of part 70 programs (i.e., the level of public review varies with the environmental significance of the change). If the public review provided by a State's NSR program meets the requirements of § 51.161, EPA will allow the NSR permit to be administratively incorporated into the part 70 permit, provided that the public review in the NSR program includes a review of the part 70 requirements that apply to the modification, and any EPA review required by part 70 has occurred. In effect, EPA will be relying on the NSR permit process to detect and correct errors in netting transactions.

In response to commenters who suggested excluding some netouts from the MES category, EPA agrees that some netouts are of lesser environmental significance and can be subject to less process. To implement this environmental significance test, EPA has decided to focus on the size of the emissions increase from the proposed project before consideration of contemporaneous emissions increases and decreases.

Since the highest percentage of total emissions will typically result from the largest emitting projects, it would follow that these would be more environmentally significant, relative to smaller projects. The EPA believes it would be reasonable to divide the netouts into two categories; those at or above major source thresholds, and those below, and place the netouts that are major in the MES category as suggested by several commenters. Consequently, part 70 includes in the significant permit revision category only netouts whose emission

increases are at least equal to major source size. The remaining netouts are placed in the minor permit revision category, in which the State may vary the amount and timing of public review. All netouts are excluded from the de minimis category. **(This may be changed.)**

The revision to place some netouts in the LES or minor permit revision category does not reduce the number of netouts subject to public review, since some opportunity for public comment is required for minor permit revisions. However, there is no requirement for a prior 30-day public comment period, and the timing of the public review and amount of public review is decided by the State. Since many more changes can be expected in smaller than in larger size ranges, EPA expects that the majority of netouts will be below major source levels and consequently fall into the minor permit revision category.

In response to the commenters who were concerned about the treatment of modifications in serious and severe ozone nonattainment areas under the proposal, the Agency believes that these concerns were unfounded. The commenters' concern is based on the de minimis provisions of section 182(c)(6) of the Act, which provide that a modification is de minimis if, when aggregated with other net emission increases over a 5-year period, the aggregate net emissions increase does not exceed 25 tpy. Thus, a series of small net increases of 25 tpy or less would be considered significant when the aggregate net increases exceeded 25 tpy. Under the proposed revisions to part 70, as well as today's revisions, a modification would need to result in emission increases above the significance level (i.e., 25 tpy) prior to netting to qualify as a "netout" and be subject to public and perhaps EPA review. Consequently, none of the units in the 25 tpy or less range which prompted the commenters' concerns would be a netout. That is, the emission increase from a proposed project would need to exceed the 25 tpy level before it would be considered a netout for the purposes of the proposal or today's revisions. A project that only exceeds 25 tpy when

aggregated with other projects would not be considered a netout. Projects less than 25 tpy could be considered for the de minimis category if they meet the criteria on which a State chooses to base its de minimis determination.

Although the Agency is willing to separate netouts into significant and minor permit revision categories, it is not persuaded that some netouts are environmentally insignificant and deserve to be exempted from public review, as suggested by some commenters. Rather, EPA believes netouts are not de minimis, and should not be included in States' de minimis categories, because every netout involves projects with emissions increases above PSD significance levels prior to consideration of contemporaneous increases and decreases. These significance levels were established in the PSD regulations as the dividing line between projects with significant emission increases and those with insignificant or de minimis emission increases. Based on EPA's experience in reviewing State's netting transactions, the Agency believes that any project involving netting has the potential for emitting above the PSD significance levels if errors are made. Since one purpose of public and EPA review of netouts is to detect and correct errors, it should not be assumed that net emissions from a particular project are below PSD significance levels until the review is completed. Consequently, the revised part 70 prohibits permitting authorities from including any netout in the de minimis category. **(This may be changed.)**

Commenters also suggested that public review of netouts is not beneficial because the public does not have the technical expertise to understand the complexity of netting transactions. While EPA agrees that in many cases the public may not possess technical capabilities sufficient to provide knowledgeable comment, this is not always the case, and does not compel that netouts be exempted from all public review. Many issues regarding compliance with the Act are complex, yet it has not deterred numerous citizen groups from becoming involved and offering detailed comment.

Changes involving netting are segregated into two classes according to whether the emissions increase from the proposed change equals the major source thresholds under part C or D of the Act. Netouts which are at least major source levels are significant permit revisions, while those which are less than major source levels are minor permit revisions. No netouts would be allowed in the de minimis class. For example, a change with a proposed increase of 60 tpy of PM-10 would be a minor permit revision as a consequence of being a significant increase and being less than the major source threshold of 100 tpy for PM-10. However, a proposed increase of 60 tpy of VOC in a serious nonattainment area where the major source threshold is 50 tpy would be a significant permit revision, because the proposed increase equals or exceeds the major source threshold.

2. Section 112(l) Changes

a. Summary of Proposal for Adopting Section 112(l) Changes

Under section 112(l) of the Act, States may establish alternative MACT standards rather than adopting federally-set MACT standards. The procedures for establishing alternative MACT standards are codified in 40 CFR 63.91 through 63.94. Such alternative MACT standards must be set such that they are equivalent to the Federal MACT standards. Alternative MACT standards may be set by States for individual sources or for source categories only through processes that include EPA and public review.

In the August 1995 notice, EPA proposed to include in the MES category the establishment or revision of alternative MACT standards under a delegated 112(l) program if they were not otherwise reviewed by the State during a previous State process. For section 112(l) alternative MACT standards that had been reviewed by the State (i.e., set through some other process that included State and public review), the proposal was vague as to what permit revision process would apply if the MACT standard were being incorporated into a permit. However, part 63 requires alternative MACT standards to be set in a separate process that

includes public and EPA review; therefore the proposal concerning establishing alternative MACT standards in the part 70 permit was moot. In light of the part 63 requirements, the question to be answered is what process to use to incorporate an alternative MACT into a part 70 permit.

b. Summary of Comments on Adoption of Section 112(l) Standards

Several industry and agency commenters objected to incorporation of section 112(l) standards being in the MES permit revision category. They contended that since the standards would be set using procedures that included EPA and public review, EPA should consider States capable of applying those procedures appropriately. One commenter pointed out that since MACT standards set under a section 112(l) program must be as stringent as the Federal MACT standards, they should not result in any increased emissions, and consequently they should not be treated as MES. Another commenter indicated that EPA should ensure that implementation of, and compliance with, section 112(l) MACT standards should not be hampered by the permitting process, i.e., applying the significant permit revision process could delay application of the MACT standard.

Two commenters believed States with approved section 112(l) programs should be given the discretion to determine the appropriate level of review for permit revisions incorporating section 112(l) MACT standards, as was proposed for the LES category.

c. Discussion of Adoption of Section 112(l) Standards

For incorporation of alternative MACT standards into a part 70 permit, the proposal, as noted above, was vague. Implicit in the vagueness is the presumption that adoption of alternative MACT standards would not be considered MES changes and could be incorporated into permits with less process. Today's revisions to part 70 specify the provisions for adopting alternative MACT standards other than through the significant permit revision process.

The provisions adopted by today's part 70 revisions for

incorporating alternative MACT standards into part 70 permits are the same provisions for adopting Federal MACT standards. This approach is appropriate since alternative MACT standards set under the part 63 provisions will have already undergone public and EPA review analogous to the Federal MACT standard setting process.

Any alternative MACT standard, after it is set, will become the applicable requirement in lieu of a federally-set MACT standard for that category. As a result, the part 70 permit may be revised to incorporate the pre-set alternative MACT standard via the administrative amendment process for incorporating newly promulgated Federal MACT standards. If operating parameter levels must be set under the alternative standard, the comparable process for Federal MACT standards will be used (i.e., administrative amendment followed by a de minimis or minor permit revision (see §§ 70.7(e)(1)(i)(E), (e)(1)(iii), and (j)(2)).

3. Plantwide Applicability Limits

(To be written.)

4. Incorporation of Monitoring Changes

a. Summary of the Proposal on Incorporation of Monitoring Changes

In the August 1995 notice, EPA proposed that certain changes to monitoring would be in the more environmentally significant (MES) category (analogous to the significant permit revision process being promulgated in today's notice). Specifically, these were ". . . changes involving new or alternative monitoring methods that have not been authorized as adequate for measuring compliance under major or minor NSR, under regulations implementing section 112(g) of the Act or under other equivalent procedures." That is, whether a change to a new or alternative monitoring method was an MES change depended entirely on whether the alternative monitoring was approved under a State minor NSR program.[16]

[16]The EPA also proposed various provisions related to monitoring changes in its August 1994 notice. The permit revision system of

b. Summary of Comments on Incorporation of Monitoring Changes

The general reaction from commenters to the August 1995 proposed provisions was that not all monitoring changes should require the full review of the MES category. Among other reasons, commenters felt that: (1) not all monitoring changes significantly affect emissions, and (2) some new or alternative methods are approved by EPA outside the permit process and do not require additional extensive review. In addition, several industry commenters argued that monitoring changes are not title I modifications and generally do not exceed the emissions allowed under the permit. Therefore, they believe that section 502(b)(10) requires monitoring changes to be allowed without a permit revision, provided a 7-day notice is submitted. Commenters also argued that subjecting any new or alternative monitoring method to full review would deter sources from making improvements to their monitoring systems.

Several State agencies recommended that monitoring changes be in the MES category only if they resulted in large actual increases in emissions and that EPA should allow States to decide which ones are to be treated as MES changes and which as LES changes (analogous to minor permit revisions).

c. Discussion of Incorporation of Monitoring Changes

The EPA agrees with the commenters on two points. The first point is that the significance of the change should be a criterion in deciding which monitoring changes need the full significant permit revision process. The second point is that the significant permit revision process is not necessary where an underlying requirement sets out a process for EPA approval of alternative monitoring. For example, the general provisions of the NSPS and MACT standards provide that alternative monitoring methods may be adopted where the alternatives have been reviewed

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the August 1995 notice, however, replaces the permit revision system proposed in August 1994. Today's notice, therefore, provides no discussion of the August 1994 provisions on monitoring changes.

and approved by EPA. Once EPA approval has been granted, then further EPA and public review of the change would be unnecessary.

The EPA also would point out that the Agency generally does not believe that it is necessary to provide for full EPA review of monitoring requirements that are established by the State using State procedures, such as monitoring for case-by-case technology limits set in a State minor NSR permit because such monitoring requirements are not subject to EPA requirements regarding test methods or EPA guidance governing the process for establishment of minor NSR monitoring. The Agency, therefore, would not designate these changes as significant permit revisions.

However, EPA disagrees with commenters who believe that the Agency should let States determine which monitoring changes belong in which category. Especially for Federal standards, EPA approval of alternative monitoring methods or test methods is important for ensuring that the alternative method is an adequate substitute for the method in the applicable standard. As mentioned above, this review need not take place in the permit revision process; however, if it has not occurred otherwise, then it may be appropriate for the review to occur as part of the permit revision process.

The EPA also disagrees with commenters who conclude that permit revisions for monitoring changes are not needed because of section 502(b)(10). As the Agency points out elsewhere in this preamble, the provisions of section 502(b)(10) must be read in context with other provisions of title V, such as section 502(a), which requires compliance with the permit, and section 504(a), which requires the permit to include emission limits and other conditions as necessary to assure compliance with applicable requirements. If section 502(b)(10) were read to apply to changes to the monitoring provisions of the permit, then a company could, after 7 days notice, begin to comply with substitute monitoring provisions rather than the provisions stated in its permit (since 502(b)(10) authorizes changes without

revision to the title V permit). As a result, the intent of sections 502(a) and 504(a) would not be met, since the company would not have to comply with all provisions contained in its permit, and since the permit would not contain all the conditions with which the company must comply.

An even more important question than whether the permit must be revised, however, is whether the alternative monitoring provision is an adequate substitute for the monitoring specified in the applicable requirement. This does not turn on whether the change is a title I modification, but is rather a technical question to be addressed by technical experts at the permitting authority or EPA. Consequently, EPA has developed the final provisions relating to monitoring changes based on what type of review of the change is appropriate to determine whether the change is adequate.

Part 70 sets forth four monitoring changes that are required to be processed as significant permit revisions. It also lists six monitoring changes that are not required to use the significant permit revision process and may be processed as other types of permit revisions. Some may require no permit revision at all, but are included to clarify that they are not significant permit revisions.

The four changes to monitoring that are significant permit revisions are as follows:

(i) Removal of a monitoring or testing requirement or decrease to monitoring frequency;

(ii) An alternative test method or change to test method;

(iii) A change to a different parameter, in cases where monitoring of a parameter is used for determining compliance; and

(iv) Alternative monitoring for which an equivalency demonstration must be reviewed by the Administrator (i.e., streamlining of multiple requirements into a single requirement);

The six listed changes which do not have to be processed as

a significant permit revision are:

(i) Any change to a monitoring requirement for a case-by-case emission limit established in a minor NSR permit, except for changes made in the NSR process to monitoring requirements established under applicable requirements other than NSR;

(ii) Alternative testing or monitoring requirements that have received EPA approval pursuant to regulations implementing section 111 or 112;

(iii) Any change to an existing monitoring requirement in the permit which is necessary to comply with a standard under section 111 or 112(d) of the Act;

(iv) Any change to a monitoring requirement that is pre-authorized in the existing part 70 permit for that emissions unit;

(v) Adoption of an alternative test method or monitoring requirement already authorized for that pollutant and source category in an applicable requirement;

(vi) A change to a different parameter that is derived from results based upon performance testing required by an applicable requirement.

Before explaining the items in each list more fully, it is worthwhile to explain the circumstances under which a permit revision could change a monitoring requirement that was established in an underlying requirement. Since part 70 permits must assure compliance with all applicable requirements, it follows that a permit revision may change a monitoring requirement only where the applicable requirement authorizes the change to be made. Absent this authorization, the monitoring provisions in an applicable requirement must be reflected in the permit and cannot be changed through a permit revision. Most Federal and State rules, however, do provide mechanisms for establishing alternative requirements.

The general provisions of Federal NSPS and MACT standards allow sources to request alternative test methods and monitoring

methods, or to propose the alternative emissions limits. These alternative test or monitoring methods, or alternative emissions limits generally require approval by the Administrator. Most SIP's also give sources the ability to propose alternative requirements, or allow the State director some discretion in establishing alternative requirements, including alternative test or monitoring methods. Therefore, when part 70 refers to an alternative monitoring change as a permit revision, it is understood that the applicable requirement has a provision that allows an alternative monitoring provision to be established, and it is assumed that the permit is the vehicle in which the alternative is established.

The first monitoring change which is a significant permit revision is the removal of a monitoring or testing requirement or a decrease in the frequency of monitoring. (This first category applies only to the removal of a requirement, not the replacement of the requirement with a substitute provision that allows equivalent or more frequent monitoring.) Since facilities frequently rely on monitoring or testing requirements for compliance with an emission limit, it is appropriate to provide for full public and EPA review of why the requirement proposed for removal is no longer needed. If the test or monitoring methods to be removed are from the applicable requirements, the removal must also be reviewed to ensure that removal is allowed under the applicable requirement.

The EPA recognizes one exception here. The monitoring or testing requirement should be removed from the permit, for instance, when the facility makes a physical change that causes it to be subject to a different testing or monitoring method in an applicable requirement. In this case the facility must remove the old monitoring requirement since the facility is no longer subject to that requirement. In this situation, there is no need for full review of the change because the underlying requirement is no longer applicable either. This situation is covered by item no. (iii) in the list of changes that do not need to be made

as a significant permit revision.

The second change to which the significant permit revision process applies is an alternative test method or a change to a test method. As with removal of monitoring requirements, a change in a test method may affect the level of compliance with the underlying emission limit, and is therefore appropriately subject to full public and EPA review.

As discussed above, however, alternative test methods also can be created in the permit where alternatives to the test or monitoring methods in the applicable requirement are allowed under the applicable requirement. If an alternative testing or monitoring requirement requires EPA approval which has been granted, then the alternative requirement being incorporated into the permit has already undergone adequate review. Therefore, this situation is covered by item no. (ii) in the list of changes that do not need to be made as a significant permit revision. This applies to NSPS or MACT standards that allow alternative test or monitoring requirements upon EPA approval.

The third change is a change to a different parameter, where compliance with the emission limit is based on parameter monitoring. This applies, for example, to SIP limits and NSPS standards which specify which parameter to use for monitoring of compliance. Consequently, changing to a different parameter represents a significant change that should be reviewed by EPA and the public.

Two exceptions apply to parameter monitoring changes. As discussed above, item (ii) in the list of changes that do not need to be made as a significant permit revision applies to changes in parameters that are approved by EPA pursuant to NSPS or MACT standards; full review is not needed twice. Item no. (vi) in the list of changes that do not need to be made as a significant permit revision applies to changes in parameters based on the results of performance testing performed as specified in the applicable requirement. This latter exception covers situations in which parameter monitoring had been

developed from performance tests (e.g., performance testing required by MACT standards). If that monitoring needs to be changed, the performance tests may need to be repeated to choose different parameters. Such a change is not a significant permit revision, since setting of the parameters originally could have been performed without EPA review.

The fourth category of monitoring changes applies to alternative monitoring for which an equivalency demonstration must be reviewed by the Administrator. This category is specifically intended to cover streamlining of multiple requirements into a single requirement, as described in EPA's White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, dated March 5, 1996. Under the White Paper, the demonstration showing that the streamlined requirement is equivalent to the multiple requirements must be reviewed and approved by EPA and reviewed by the public. Consequently, this type of monitoring change is placed in the significant permit revision category.

It should be pointed out that there may be other monitoring changes (in addition to those listed above) that should be processed as significant permit revisions because they meet separate criteria for a significant permit revision. Two examples include substitute monitoring requirements established in the permit under a section 112(l) program, and alternative SIP monitoring requirements established in a permit pursuant to § 70.6(a)(1)(iii). These changes are not listed above, but are significant permit revisions because substitute 112(l) requirements and alternative SIP requirements are themselves significant permit revisions.

5. Source Specific SIP Revisions

In the August 1995 notice, the proposed § 70.7(e)(ii) listed "any source-specific SIP revision" as an LES change. The preamble did not elaborate further on the topic. An environmental group commented that source-specific SIP revisions should be in the MES category and subject to the full permitting

process because they often involve setting or revising emission limits and may profoundly affect an area's air quality. The group also argued that the Act requires all SIP revisions to be preceded by notice and comment opportunity and EPA lacks authority to dispense with this requirement. They noted that the public comment required to meet the Act's SIP procedures can be relied on to meet the proposed part 70 MES process. Other commenters, however, supported the inclusion of source-specific SIP revisions in the LES category.

The EPA agrees that source-specific SIP revisions belong in the MES (significant permit revision) category. Most source-specific SIP revisions are environmentally significant changes because they alter a source's SIP emission limits or monitoring requirements. As such, EPA agrees they should be reviewed fully during the part 70 process because the significant permit revision category is meant to include such changes that are environmentally significant enough that they are subject to notice and an opportunity for comment under the Act or EPA rules (e.g., major NSR, 112(g), PALs).

Since the SIP process already requires a 30-day public and EPA review, the Agency feels that, with sufficient merging of a source-specific SIP revision and the part 70 process, there should be little or no additional public and EPA review required due to the significant permit revision process. Therefore, if the source-specific SIP revision meets the provisions of § 70.6(a) and (c), and includes a compliance certification, the public and EPA review period for the SIP revision could satisfy part 70 review requirements.

F. Merging Programs

1. Summary of the Proposal on Merging Programs

The permit revision system proposed in the August 1995 notice divided permit revisions into two broad categories; (1) those changes that are subject to prior State review programs established pursuant to the Act, and (2) all other changes. Prior State review programs include issuance of preconstruction

permits under NSR, SIP revisions, and case-by-case determinations under section 112(g) of the Act, where these processes include an opportunity for public and EPA review of the requirements being created.

This division was made with the objective of allowing changes that are subject to prior State review to be automatically incorporated into a part 70 permit upon completion of the prior State review. Automatic incorporation would be allowed if the part 70 permit revision process were combined with the prior State review process, which would reduce or eliminate duplication of review by the permitting authority, the public (including affected States), and EPA to the extent these were required by both processes. That is, the two processes would run in combination or parallel and, at the end of the prior State review process, the part 70 permit revision requirements would have been met through the State review process. The part 70 permit would then be immediately revised by attaching to it the new part 70 permit terms resulting from the State review process. This combining of processes is termed "merging" of the part 70 process with a prior State review process. For all other changes (i.e., those not subject to a prior State review process), merging would not be possible and they would go through the appropriate standard part 70 permit revision process.

2. Summary of Comments on Merging Programs

Except for one State agency, commenters were unanimously in favor of the merged process concept as an efficient mechanism that would save time and resources. The one dissenting commenter was concerned that this process could delay issuance of NSR permits because of the added time of the EPA review period.

There was also some confusion expressed as to how the merging of the review processes would work. Some commenters thought that merging required a single permit system (i.e., the permitting authority issues a single permit which acts as both a preconstruction permit and an operating permit).

3. Discussion of Merging Programs

Provisions in § 70.7(h) specify that where a change is subject to a prior State review program, the part 70 permit revision process may be merged with the prior process. The section goes on to describe the merging process. Merging can apply to all permit revisions for which there is a prior State review of the change. It is, however, the significant and minor permit revisions where the greatest degree of duplication of effort can be eliminated due to the requirements for public review and EPA opportunity for objection in those processes.

The August 1995 notice proposed that merging be mandatory pursuant to the provisions of section 502(b)(6) of the Act which require "Adequate, streamlined, and reasonable procedures for . . . expeditious review of permit actions . . .". Efforts under a State review program include public comment and EPA review that largely duplicate steps in the part 70 permit revision process. To the extent that the resulting part 70 permit terms can be determined at the time of the prior State review, it is sensible from a resource standpoint to carry out public, affected State, and EPA review for the part 70 permit revision at the same time as public and EPA review is provided under the State review process, rather than sequentially. Some States are also combining EPA review with public review in issuing initial permits to further streamline that process.

Although EPA expects permitting authorities to adopt the merging approach as the more sensible approach, it is not making merging mandatory in toady's action. This will allow permitting authorities with programs that for some reason are not designed to accommodate the envisioned merging concept either to modify the merging process as needed to accommodate their specific program or to not merge the processes. To emphasize the importance EPA places on merging, however, the concept is retained in part 70 in the revised § 70.7(h).

By not making merging mandatory, part 70 responds to the comment that the proposal could delay issuance of NSR permits. Rather than wait for the end of EPA's review of the part 70

permit revision, which could delay issuance of the NSR permit, permitting authorities may at the end of the NSR public review period proceed to issue the NSR permit and then provide for EPA review prior to revision of the part 70 permit. Permitting authorities should keep in mind, however, that where a separate NSR review process indicates deficiencies in the NSR permit, EPA's policy will be to advise the State and the source that EPA may object (for reasons discussed in section IX. of this preamble) to issuance of the part 70 permit during the subsequent part 70 review period, and may take other steps including enforcement action under section 113 or 167 of the Act as may be necessary to prevent construction of a new or modified source that has a legally deficient NSR permit i.e., a source without a permit that actually meets the applicable NSR requirements of the Act and the SIP.

The one necessity in the merging concept is that the process for revising the part 70 permit run concurrently with the prior State review process. This means that the source should submit a part 70 permit revision application at the time it submits a NSR, SIP revision, or section 112(g) application. The permitting authority will review both applications and then make the draft part 70 permit revision available for public review along with review of the NSR permit, SIP revision, or section 112(g) permit. As discussed previously, EPA review could begin concurrent with public review or, if EPA review would delay issuance of a NSR permit, the permitting authority could issue the NSR permit prior to the end of EPA's review of the part 70 permit revision.

For a merged process to meet the requirements of part 70, an adequate opportunity for public participation and affected State and EPA review must be provided (unless the change is de minimis) and the revisions that would be needed to the part 70 permit as a result of the change must be defined. Changes occurring under a State review program generally impose either new applicable requirements or alter existing ones. The new or altered requirements are by definition applicable requirements which must

be incorporated into the part 70 permit on or before the change is operated. Any terms or conditions of the existing part 70 permit that no longer apply or that must be revised as a result of the change will need to be replaced by new terms and conditions, declared no longer applicable, or revised as part of the State review/permit revision process. A description of which of these actions was taken must be available for public and EPA review during the State review process and also specified in the addendum to the part 70 permit.

The result of merging is that at the end of a merged process, an addendum containing the revised terms and conditions for the part 70 permit is produced. This addendum is then attached to the part 70 permit which revises it without further process. The merged process would also have to assure that the permit content requirements of §§ 70.6(a) and (c) were met. However, many of these requirements may already be in the part 70 permit as boilerplate conditions and, if so, will not have to be repeated in the permit revision, if they apply to new permit requirements. Such requirements as reporting, annual certification, inspection and entry, and the duty to pay permit fees should work well as boilerplate conditions. Conversely, requirements that are revised or created on a unit-by-unit basis, such as periodic monitoring or parameter monitoring to meet MACT standards, are not workable as boilerplate conditions and will have to be created as part of the permit revision process.

Following are detailed discussions of how merging the part 70 permit revision process can be applied to various State review processes.

In a "full" permit issuance process, the permitting authority receives the permit application, prepares a "draft" permit, and makes the draft permit available for 30 days for public review. After determining any changes needed to the permit due to public review, the permitting authority prepares a "proposed" permit and submits it to EPA for a 45-day review. After making any changes due to EPA review, the final permit is

issued. This process would be followed in preparing significant permit revisions. (For minor permit revisions, public review could be for a shorter period of time, commensurate with the environmental significance of the change.)

For merging with a NSR process, the source would submit with its preconstruction application a part 70 permit application that describes which provisions of the NSR permit would be incorporated into the part 70 permit. The source would also have to submit the following additional part 70 requirements: (1) the certification by a responsible official that the permit application is true, accurate, and complete, and (2) as necessary, provisions for monitoring and/or recordkeeping sufficient to demonstrate compliance with the new or revised permit terms (e.g., compliance assurance monitoring or periodic monitoring).

During a major NSR process, the public and EPA are provided a 30-day period in which to comment on the proposed preconstruction permit. The preconstruction permit is then issued. During a merged NSR/part 70 process, the permitting authority would make the part 70 permit terms available for public comment at the same time the public is commenting on the NSR permit. The permitting authority could do this by preparing a separate part 70 permit addendum which would later be attached to the permit as a revision, or it could indicate which provisions of the draft NSR permit will be applicable to the part 70 permit. Conversely, it could indicate those terms in the NSR permit that are not applicable to the part 70 permit, e.g., those terms that apply only during construction of the facility. Since EPA has the opportunity to review the NSR permit during the public comment period, it could also review the part 70 permit at the same time.

To reduce the overall time of EPA and public review, the permitting authority may provide that the 45-day EPA review starts at the same time as the 30-day public review. A State may decide to do this if, for example, it believes that no changes

will likely be made to the draft permit due to public comment. This can shorten the time for the whole permit revision process by 30 days. In addition, if EPA determines that the draft permit will not change as a result of public review, it could waive the final 15 days of its 45-day review by formally determining in a written public notice that it has reviewed the permit and will not object at that stage. (Such a notice would not waive EPA's authority to object to the permit as a result of a citizen petition filed during the subsequent 60-day period for such petitions.) Thus, EPA's review period would end when the 30-day public comment period ends. Where the draft permit does change due to public comment, EPA is entitled to up to 45 days to review the changed permit revision. However, EPA would not necessarily need the full 45 days and could issue a public notice of no objection in this case. The EPA expects that changes to the draft permit as a result of public comment will be an infrequent occurrence.

The process to revise a SIP includes rulemaking through State administrative procedures, including a public hearing and a 30-day public comment period, and EPA review as Federal rulemaking. For source-specific SIP revisions, there is ample opportunity in the process to merge a part 70 permit revision process. The sources subject to the SIP revision could prepare an application to revise the part 70 permit. The application would contain (1) permit terms and conditions assuring compliance with the new SIP requirements, (2) if necessary, periodic monitoring or compliance assurance monitoring requirements, and (3) a certification that the information is true, accurate, and complete. The State would provide for public review of the part 70 permit revision during public review of the State rule revision. The State would then submit the adopted rule as a proposed SIP revision to EPA along with the part 70 permit revision addendum. During EPA review of the proposed SIP revision, EPA would also review the proposed part 70 permit revision to see that it accurately reflected the SIP revision and

met the requirements of part 70. Upon completion of the SIP revision process, assuming the revision is approved, the part 70 permit would be revised by attaching the addendum without further action. For a source-specific Federal implementation plan (FIP) revision, EPA would carry out the process of the FIP revision including public review. The EPA could work with the State as the permitting authority to provide for public review of the part 70 permit revision during public review of the FIP revision. Upon revision of the FIP, EPA would provide the part 70 permit revision addendum to the State for attachment to the part 70 permit.

The EPA's regulations implementing section 112(g) apply only to new or reconstructed sources which are themselves major. The process for setting a section 112(g) standard could be a part 70 permit revision, a NSR action, or a separate 112(g) action that would include a 30-day public comment period and a 45-day EPA review. If the unit subject to section 112(g) is at an existing source with a part 70 permit, the section 112(g) standard can be established as a part 70 significant permit revision. If the change is subject to NSR, the section 112(g) requirements would be set during the NSR process and the part 70 permit revision can be merged with the NSR process as discussed previously.

If the section 112(g) unit is a new stand-alone source, or if the source at which the unit is being constructed is not major and does not have a part 70 permit, the source will be major after the change and will need a part 70 permit. In these cases, an initial part 70 permit application is not due to the State until 12 months after commencing operation of the source or the major modification. The process to establish the 112(g) requirement may occur as a separate process followed by a part 70 permit application 12 months after commencing operation. The processes may be merged, however, by carrying out the part 70 permit issuance process when the section 112(g) standard is set rather than waiting 12 months. Thus, a later part 70 permit issuance process will not be necessary.

Upon completion of any merged State review and part 70 permit revision process, the part 70 permit is revised by attaching to the permit the addendum or the appropriate portion of the NSR permit, the 112(g) determination, or the SIP revision. Part 70 permits can be revised in the same way for de minimis permit revisions where the change goes through minor NSR. The part 70 permit revision application would contain the same elements as described previously for a merged major NSR/part 70 permit revision action. Similarly, after the minor NSR permit is issued, the part 70 permit can be immediately revised by attaching an addendum.

G. Permit Shield

The August 1995 notice proposed adding a new § 70.7(g) to clarify those permit actions eligible for the permit shield. The proposal would have allowed the permit shield for any MES change, any LES change that underwent EPA and public review, and any change made by EPA as a result of public petition.

One commenter approved of a permit shield for MES changes. One commenter opposed limiting the shield for only permit terms that were revised or added as a result of EPA objection in response to public petition. The commenter would have had the shield apply to a change for which the public petitioned EPA to object but where EPA chose not to object.

This section is renumbered as § 70.7(i) and is reworked to reflect the permit revision system being adopted today. As under the original part 70, the permit shield is available only for actions that are subject to public and EPA review. Accordingly, under the revised part 70, actions for which a permit shield are available are initially-issued permits, permit reopenings, permit renewals, significant permit revisions, and minor permit revisions that undergo prior EPA and public review.

The Agency has reconsidered separately identifying permit terms that are revised or added as a result of public petition for EPA to object. Any such changes made as a result of EPA objection are made as part of the permit revision process, not as

a separate, discrete process. These changes are, therefore, included as part of the permit revision and thereby covered by the permit shield. This, of course, includes those changes for which EPA was petitioned to object but chose not to.

H. Incorporation of MACT Standards

1. Summary of the Proposal for Incorporation of MACT Standards

In the August 1994 notice, EPA proposed a two-step process for incorporating MACT standards that were set after a source's permit was issued, or for adopting MACT standards into permits where the source makes a change that newly subjects it to a MACT standard. In either case, the first step was proposed to be only an administrative amendment followed by a later permit revision to adopt any compliance details that are later determined. For MACT standards set prior to permit issuance, the standard would be included in the permit at the time of issuance.

In general, MACT standards provide a period, usually 3 years, for compliance after the date the standard is set. (For some standards, there could be specific requirements, e.g., equipment leaks, for which compliance is earlier than 3 years.) Consequently, if the source already has a part 70 permit and less than 3 years remain before the renewal date, the proposed § 70.7(j) (which was § 70.7(f) in the original part 70) would allow adoption of a new MACT standard to be delayed until permit renewal. If more than 3 years remain on the permit term, however, compliance will be required prior to permit renewal, and the standard would thus have to be adopted prior to renewal. Proposed § 70.7(j) would require incorporation into the permit of such standards within 18 months of the date the standard is set. In either case, when a new MACT standard is set, all sources which are subject to that standard must send a notice to the permitting authority, within a specific period of time, that indicates the applicability of the standard to the source. In many cases, this time limit for submittal of the notice is 4 months.

If, after a MACT standard is set, a source wishes to make a

change and the change subjects the source to the standard, such as modifying an existing unit in such a way that the modified unit becomes subject to the MACT or constructing a new unit in the MACT category, the source would need to revise its permit to incorporate the standard before it could operate the change.

Frequently, MACT standards offer the source compliance options which require source-specific judgments, as opposed to MACT standards that clearly specify detailed compliance requirements. The specific options a source chooses must be determined before the compliance date of the standard. Determination of the compliance parameters requires some period of operation to verify performance results. To allow the source to operate and determine compliance parameters, the permit will have to have been revised to incorporate the MACT standard and thus allow operation. This would be the first step of the two-step permit revision process.

Once the compliance parameters are determined, the source would submit to the permitting authority a Notification of Compliance Status (NCS) which establishes the parameter ranges that will be used to indicate proper operation and maintenance of the control device. The permit may then be revised to incorporate these compliance parameters, which would occur with the second permit revision step.

The August 1994 notice (59 FR 44496) described three types of MACT standards: (1) type one, self-implementing standards where detailed compliance requirements are specified in the standard itself, and even though for some standards sources may choose among several clearly defined options, source-specific judgments are not required; (2) type two, standards which contain options from which the source will choose and then generate source-specific compliance requirements; and (3) type three, standards which contain options where the source develops source-specific alternatives, but case-by-case approval by EPA[17] or the

[17]The compliance parameters would be approved by EPA as the implementing agency if the State had not taken delegation for

permitting authority of some alternatives, such as emissions averaging, is required. Following is a brief discussion of the proposed processes for adopting the three types of standards. A more detailed discussion of today's requirements for adopting MACT standards is under preamble section VIII.H.3. below.

Type one MACT standards could be incorporated by administrative amendment without the need for any further permit revision. The administrative amendment process is initiated by the permitting authority if for a new MACT standard, or by the source if the source makes a change that causes it to be subject to an existing MACT standard. The administrative amendment by the permitting authority occurs after the source submits the initial notification that it is subject to the new MACT standard. If made by the source, the administrative amendment must occur before the source operates the change that makes it subject to the MACT standard.

Type two and three standards may initially be incorporated into the permit in the same manner as the type one standards; however, a second permit revision must follow to incorporate the source-specific compliance requirements which are determined later. The initial administrative amendment would contain (1) a statement that the standard is an applicable requirement, (2) a compliance schedule, (3) other requirements that apply to the source prior to the MACT compliance date, and (4) a requirement to apply, by the deadline for the NCS, for a permit revision to incorporate compliance parameters. For type two standards, the August 1994 notice proposed that the minor permit revision process would be used as the second permit revision step to incorporate compliance parameters. For type three standards, the compliance requirements would be incorporated into the permit via the significant permit revisions process since case-by-case approval by EPA or the permitting authority would be necessary.

The August 1995 notice proposed only one change to the MACT

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enforcement of the MACT standard.

incorporation system proposed in the August 1994 notice. The second step of incorporating type two and three standards would be via the LES category (analogous to minor permit revisions) but the level of process would be varied according to the nature of the compliance requirements being adopted. That is, for the type three standards, more administrative process would be expected than for type two standards, but the second step of incorporating type three standards would not be an MES change (comparable to a significant permit revision).

The August 1994 notice also proposed that the permitting authority provide public notice and access to a list of all sources whose permits are being reopened to incorporate MACT standards, and that all materials submitted by the source prior to the second step be placed in a public docket for the two-step MACT process.

2. Summary of Comments on the Proposal for Incorporation of MACT Standards

Most of the commenters on the proposed procedures for incorporating MACT standards favored the two-step process but believed that the process should be simplified further. Primarily, most commenters supported only the first administrative step alone to incorporate the standards on the basis that MACT standards had undergone full public review during development and additional review is not necessary. Some pointed out that full public review would occur upon permit renewal.

One commenter stated that the second step should be necessary only where the new standard would conflict with existing permit terms. Two commenters opposed the first step believing that incorporation should be at the time of compliance. One agency suggested that its proposed public announcement procedure be used for both steps. One commenter proposed that the process for the second step be based on what effect adopting the standard would have on emissions (no equipment changes vs. slight increases vs. emissions decreases).

For those commenters that recognized a need for a second

step with process greater than that provided by an administrative amendment, most favored only the minor permit revision process. Only one commenter recognized the need for a significant permit revision, but then indicated it should be used only where case-by-case MACT provisions are developed only through the part 70 permitting process.

Three commenters opposed the proposal to provide notice of all sources whose permits had been reopened to incorporate MACT standards. Three commenters supported and three commenters opposed the requirements to maintain a docket of information submitted by the source prior to the second step of the MACT incorporation process.

3. Discussion of Incorporation of MACT Standards

The EPA disagrees with commenters who believe the second step of the MACT incorporation process is unnecessary or should be an administrative amendment. The two-step process would be used only for those MACT standards that allow a source to choose among compliance options or set case-by-case requirements that were not clearly set out in the MACT standard. Previous review of the MACT standard, therefore, would not suffice to provide administrative process for such decisions. It is EPA's position that review of the chosen compliance options should occur when they are adopted into the permit, not at permit renewal. In addition, EPA believes review should occur regardless of the effect of the new permit conditions or whether the new conditions will conflict with existing permit terms.

The Agency notes that the first step of incorporation is necessary so that incorporation of the MACT standard into the permit occurs at the time the standard becomes applicable to the source. Incorporating the MACT standard clearly establishes that the source is subject to the requirements in the standard. If the Agency waited until the compliance date to incorporate the standard as suggested by some commenters, the permit would not be contemporaneous or assure compliance with all applicable requirements.

With respect to the proposal that the permitting authority provide notice of sources for which MACT standards have been adopted, EPA feels is necessary for the public to have access to permitting authority decisions as to the applicability of MACT standards. The notice would provide opportunity for the public to indicate whether they believe any other sources are subject to the new standard or disagree with any sources that assert that the standard does not apply to them. The EPA believes that this notice would need to be as extensive as a notice for public comment on a permit revision. States may make the information available electronically to the public.

The proposal for the permitting authority to maintain a public docket of information concerning sources' complying with MACT standards prior to final compliance was proposed because of the prospect of sources following implementation plans, especially for the Hazardous Organic NESHAP (HON). However, EPA has found this not to be a common occurrence. This proposed requirement is therefore not being adopted.

The final requirements for adoption of MACT standards into part 70 permits closely follows the 1994 and 1995 proposals, with some refinements based on the permit revision system being adopted into part 70 by today's notice. Following are discussions of the procedures for the various scenarios under which MACT standards will become applicable to a source.

a. New MACT Standards Set Prior to Permit Issuance.

The EPA regulations for adoption of section 112 standards (40 CFR 63.XX) require that after a standard is set, any source to which the standard applies must notify the permitting authority. Generally, this notification is due 4 months from the date the MACT standard is promulgated.

Since MACT standards are to be implemented through operating permits, if no permit has been issued for a source, no further action is required by a source that has notified the permitting authority unless the compliance date occurs before the source's permit is issued, in which case the source would have to comply

with the MACT standard before permit issuance. If the MACT compliance date does not occur before permit issuance, the MACT standard will have to be included in the source's permit application and be incorporated into the permit during initial issuance. The issued permit would need to contain (1) a statement that the standard is an applicable requirement, (2) a schedule for compliance, (3) a requirement to submit any implementation or report required by the MACT standard, and (4) a requirement to apply for a de minimis or minor permit revision, as appropriate, to incorporate the final compliance parameters. Reference to these permit content requirements are added to § 70.6(a)(1).

As previously discussed, a later permit revision will not be needed for some MACT standards. These are those standards (i.e., type one) which specify detailed compliance requirements. Although some of these standards may allow sources to choose among several clearly-defined options, source-specific judgments are not required. These MACT standards would be incorporated into the permit as written and no further permit revision would be necessary. If compliance options are available in the standard, the source would just choose and implement one of the options and maintain a record of which option were chosen. If the source wished to change options, it need only record the new option and maintain the record of the compliance options under which it operates.

For MACT standards for which source-specific compliance parameters must be determined (i.e., type two or three), a permit revision would be needed after the determination to incorporate those parameters. At some date specified in the MACT standard, and after the requisite testing has been accomplished, an NCS must be submitted to the permitting authority specifying the compliance parameters. The permit revision application will be due with the NCS.

The permit revision to incorporate compliance parameters will be either a de minimis or a minor permit revision, depending

on the nature of the process necessary to determine the compliance parameters. If the source need only determine compliance parameters by operating a test method that is described in the MACT standard and no further case-by-case decisions are needed (i.e., type two), the compliance parameters may be incorporated into the permit via a de minimis permit revision. If the source needs to establish case-by-case parameters (i.e., type three) which need approval by the permitting authority, e.g., emissions averaging, a minor permit revision would be used to incorporate the compliance parameters into the permit.

Compliance parameters that may be incorporated by a de minimis permit revision are those that are determined by following procedures in the MACT standard that are explicit and thus will result in distinct conclusions that are replicable. Public and EPA review of such conclusive results would be of trivial value. Examples of such compliance parameters are XXXXXXXXXXXXX

The minor permit revision process is necessary for incorporation of compliance parameters where testing must be performed and the results are not assured by the testing protocol or where decisions are allowed that will affect compliance parameters. Examples include emissions averaging and alternative monitoring or recordkeeping, such as data compression techniques. It is appropriate to allow the public and EPA an opportunity to review such decisions.

b. MACT Standards Set After Permit Issuance

For MACT standards set after the source's permit is issued, the permitting authority has the responsibility to incorporate the new applicable requirement into the permit. The process would consist of an administrative amendment to initially incorporate the standard, followed by a second step (if appropriate) permit revision initiated by the source to set any source-specific compliance parameters. The second step permit revision process would be identical to the second step process

previously described for MACT standards adopted into a permit at initial issuance, i.e., a de minimis permit revision or a minor permit revision.

c. Source Changes That Result In Applicability of a MACT Standard

If a source makes a change, such as modifying a unit or constructing a new unit, that makes an existing MACT standard newly applicable to the source, it is the source's responsibility to incorporate the MACT standard into the permit. This process will have to be completed before the source can operate the change. Initial incorporation may be accomplished by a notice-only permit revision. A discussion of the rationale for allowing the notice-only process for initial incorporation is in section VIII.C.2. of this preamble which covers notice-only permit revisions. The next step to adopt source-specific compliance parameters (if appropriate) will again be the same as for MACT standards adopted into the permit during initial issuance. **(Need to add timing, i.e., when can source begin operation for determining compliance parameters.)**

I. Public Review

Section 70.7(l) (§ 70.7(h) in the original part 70) specifies requirements for public participation procedures and the permit revisions to which the procedures apply. In August 1994, EPA proposed to modify the procedures to reflect the permit revision system proposed at that time. Today's revisions adopt the proposal but modify it to reflect the permit revision system being established in today's notice. In summary, public participation is required for initial permit issuance, permit renewals, significant permit revisions, and minor permit revisions.

In the August 1995 notice, EPA proposed in a new § 70.4(d)(4) to require States to notify the public at least quarterly of permit revisions for which public review was not provided (i.e., administrative amendments and notice-only and de minimis permit revisions). One regulatory agency agreed with

this proposal and indicated that a general notice in a newspaper of general circulation with names of companies which have obtained such revisions should suffice as adequate. Another agency felt that if the revision did not warrant public comment, the agency should be allowed to provide public access, but not be required to issue a public notice. An industry commenter asserted that newspaper notice would be too costly and at the most semi-annual notices should be adequate. The commenter also supported flexibility in the way notice was provided.

The EPA agrees with comments that less costly types of notices should be allowed. Thus, the regulations do not specify a particular type of notice. States may provide notice by newspaper, State register, mailing lists, computer bulletin boards, or other equivalent means. Some type of notification of the public is required, however, since section 502(b)(6) of the Act requires the public to be notified, including the opportunity for public comment, rather than simply providing the public access to information. Without notice, the public may not know to access information of interest.

IX. Changes to Section 70.8

A. EPA Review of Expedited Permit Revisions

Several commenters on the August 1995 proposal indicated that EPA should clarify in part 70 the procedures for EPA review of permit revisions. The following preamble section discusses EPA review of operating permit revisions which incorporate NSR requirements. In addition, § 70.8(c)(5) is added to indicate that EPA will not review and object to any expedited permit revisions. This is in conformance with § 70.7(e) which defines expedited permit revisions as those that may be made without public, affected State, or EPA review until renewal.

B. EPA Review of NSR Permit Terms

1. Summary of the Proposal on EPA Review of NSR Permit Terms

In the preamble to the August 1995 proposed part 70 revisions, EPA gave three considerations that it would use in determining whether to object to permit revisions. The first was

whether all applicable requirements and part 70 requirements to which the source was subject as a result of the change are contained in the permit revision. The second was whether the new or revised permit terms and conditions are enforceable as a practicable matter. The third was whether procedural requirements relating to adequate public participation and development of a supporting record were substantially met.

The Agency then outlined several limitations that it proposed to place on its objection authority. First, for more environmentally significant changes (significant permit revisions in today's notice), EPA would be required to raise its objection prior to the permitting authority's final action on the change, provided the defect to which EPA objected was reasonably apparent during the public review period. Second, changes which the State proposed and EPA approved as de minimis would not be subject to any EPA review or objection or citizen petition prior to renewal of the permit. Third, for less environmentally significant changes (minor permit revisions in today's notice) that are not de minimis, EPA would limit its review and objection opportunity for at least 5 years following program approval. For these changes, EPA would object to a change only in response to a meritorious citizen petition, where the permit revision at issue would likely lead to significant adverse environmental consequences.

In addition, the August 1995 preamble clarified how EPA would use its objection authority with respect to preconstruction permits that are incorporated into part 70 operating permits. (Although the clarifications concerned an objection in response to a citizen petition, these same clarifications would apply to any objection, since the Administrator's objection authority under section 505(b) of the Act applies equally to all objections.) The August 1995 notice stated that EPA would review a NSR action under essentially the same three criteria mentioned above. That is, to assure that the part 70 permit contained provisions in compliance with all applicable requirements of the

Act, including the applicable implementation plan, EPA would review the change from an NSR action to ensure that the terms of the NSR permit were properly incorporated into the part 70 permit, that the terms were enforceable, and that procedural requirements were substantially followed. In particular, for major NSR actions, EPA would review the process used by the permitting authority to determine what are the applicable SIP requirements for the source, especially the BACT or LAER. The purpose of EPA's review would be to assure that the required procedures mandated by section 110(a)(2) of the Act and reflected in the SIP were substantially met, and that the determination by the permitting authority was properly supported, enforceable, and consistent with all applicable requirements. In a footnote, EPA explained that any EPA determination that the SIP was not followed based on procedural errors must follow from the result that the errors were so serious and centrally relevant that there was a substantial likelihood that the permit would have been significantly changed if the errors had not been made (60 FR 45543 n.4). If the permitting authority's technology determination met these criteria, EPA would not second-guess that determination.

For minor NSR actions in the more environmentally significant category, EPA clarified that it would examine the calculations used on which to base any decision that the change was subject to minor NSR rather than major NSR requirements.

2. Summary of Comments on EPA Review of NSR Permit Terms

Several commenters objected to what they described as EPA's broadening of the Act's objection power with regard to NSR actions. They felt that EPA's scope of review and objection were limited because they believed a State's function under title V was mostly administrative and not substantive, and consequently EPA's review of the State's part 70 permit must consider only administrative, not substantive, requirements. In addition, several commenters asserted that any EPA review of a State's implementation of substantive requirements must be exercised

under separate statutory provisions related to those requirements. They argued that title V did not give EPA authority to object to NSR issues, but only to issues pertinent to part 70.

Several commenters supported the limitations on EPA's objection spelled out in the preamble, but were concerned that the regulations did not contain these same limitations and that as a result there were inconsistencies between the preamble and the regulations. They suggested that EPA revise part 70 to contain the limitations expressed in the preamble.

Several State agencies disagreed with EPA's proposal to include "development of a supporting record" as a basis for a potential EPA objection of NSR requirements in an operating permit revision. They believe EPA should discuss this issue during the comment period on the NSR permit, not during EPA's objection period for the part 70 permit.

Finally, some commenters criticized EPA's proposal to waive its authority to object to LES permit revisions for at least 5 years after approval of the State part 70 program. These commenters asserted that EPA lacks the authority to promulgate such a waiver in its regulations in light of the mandatory language of section 505(b)(1).

3. Discussion of EPA Review of NSR Permit Terms

As for EPA's authority to object to NSR requirements under title V, EPA finds few limitations on its objection authority in title V. Section 505(b) requires EPA to object to the issuance of a title V permit that contains provisions that the Administrator finds are ". . . not in compliance with the requirements of an applicable requirement of this Act, including the requirements of an applicable implementation plan." The phrase "including the requirements of an applicable implementation plan" provides an express basis for EPA to object to the incorporation into a part 70 permit of requirements from an NSR permit that it finds are not in compliance with the procedural and substantive requirements of the SIP.

The presence of legal authority does not mean, however, that EPA has the resources to review for compliance with applicable requirements, including the SIP, every NSR permit subject to an EPA objection opportunity. Where the NSR requirements appear to comply with the SIP, or where no information is available to EPA indicating noncompliance with the SIP, it is unlikely that EPA would further investigate the issue. In such cases, EPA's review would likely take less time than the 45 days provided under the Act.

The EPA agrees with commenters suggesting that the Agency codify in regulations the limitations EPA would impose on its objection powers. These limitations simply represent EPA's interpretation of how best to determine whether a part 70 permit incorporating NSR provisions satisfies the standard for EPA objection under section 505(b), i.e. whether the permit is in compliance with the applicable requirements. Section 70.8(c)(6) and (7) are added to reflect these requirements.

As to the inclusion of a supporting record, the Agency is not persuaded by commenters suggesting that SIP requirements for a supporting record are not relevant to an EPA objection. The Agency agrees that lack of a supporting record may not always be a basis for an objection, since the NSR permit on its face may comply with the substantive requirements of the SIP despite the lack of records documenting the decision-making process. If there is some question whether the NSR requirements are in compliance with the SIP, however, the lack of supporting documentation could be an additional basis for objection, on the grounds that the decision appears to be arbitrary absent documentation to the contrary.

In reviewing NSR requirements for incorporation into the part 70 permit, EPA will consider whether (1) all applicable requirements and part 70 requirements to which the source is subject as a result of the change are contained in the permit revision, (2) the new or revised permit terms and conditions are enforceable as a practical matter, and (3) the applicable

substantive and procedural requirements of the implementation plan were followed. The procedural requirements of the SIP would include any requirements for public participation and for the development of a supporting record. The EPA would not object to State case-by-case technology decisions or other decisions regarding applicable requirements that meet the three criteria stated above.

It should be noted that the wording of the third criterion has been changed from the proposal by adding the reference to substantive and procedural requirements of the SIP, rather than just procedural requirements. This is to more accurately reflect the language of section 505(b), which refers to the "requirements of an applicable implementation plan," without limitation as to whether requirements are procedural ones.

In deciding whether the substantive and procedural requirements of the SIP were followed with respect to case-by-case technology decisions, EPA would consider whether the decision was consistent with SIP procedures governing the establishment of case-by-case technology, and supported by documentation required by the SIP. The decision need not necessarily be the one EPA would have made, but it could also not be arbitrary or capricious. The EPA would not consider procedural errors significant unless the errors were so serious and related to matters of such relevance that it was very likely that the permit would have been significantly changed if such errors had not been made.

For netting transactions subject to an opportunity for EPA objection, EPA would also examine the calculations used to base any decision that minor rather than major NSR was applicable to the change.

C. EPA Review of Significant Permit Revisions

The August 1995 preamble proposed that EPA would be required to raise any objection to a significant permit revision, for any defect that was reasonably apparent during the public review period, prior to the permitting authority taking final action on

the revision. The intent of this proposal was to provide certainty to sources. It would require EPA to take the initiative to examine, during the public comment period, those permits it specifically wished to review and indicate to the permitting authority if it determined that there was a basis upon which EPA would likely object. (This would not prevent EPA from later objecting due to a public petition or from reopening the permit for cause at a later date.) If there was no such notification by EPA, then EPA would not be allowed to object to the permit revision.

Nine commenters supported providing certainty to sources and preventing EPA from objecting to the permit after the permitting authority taking final action on the permit.

The Agency believes this is not a necessary requirement. The permitting authority is prevented by § 70.7(a)(1)(iv) from issuing a permit if EPA has objected to it during the EPA review period provided by § 70.8(c)(1), which is within 45 days of receipt of the proposed permit. Section 70.8(c) allows EPA only the 45 days in which to object. The permitting authority should not issue the permit until that time expires, unless it knows via notice from EPA that there will be no EPA objection. There should, therefore, be no situation whereby EPA can object to a permit after it has been issued.

As discussed in section VIII.F. of this preamble, EPA's 45-day review of a significant permit revision generally would start after the public comment period and any changes have been made to the permit revision due to public comment. To expedite the process, including merging programs, however, EPA's review may be overlapped with the public comment period. The Agency feels it is therefore unnecessary to require EPA to preview significant permit revisions during the public comment period. If a permitting authority wishes to expedite the procedures, it need only overlap EPA review with public review. This will essentially provide the certainty intended by the August 1995 proposal.

X. Changes to Part 51 (This section will be reworked after decisions on public participation issues.)

A. Summary of the Part 51 Proposals

The August 1995 notice included proposed changes to §§ 51.160 and 51.161 to address public participation in the NSR program for all NSR changes, whether at major or nonmajor sources. Prior to today's action, § 51.161(b)(2) required a 30-day comment period for all major and minor NSR actions. The August 1995 proposed revisions to § 5.161(b)(1) would retain the 30-day public comment requirement for major NSR changes and all netouts at part 70 sources. For all other changes subject to minor NSR, the August 1995 proposed revisions to § 51.161(c) would allow the State to vary the amount and timing of public review based on the environmental significance of the change, in the same manner as it was proposed that States could vary the public participation requirements for minor permit revisions under part 70. In addition, proposed § 51.161(c) would allow the permitting authority to classify some changes as de minimis and thus issue the minor NSR permit for those de minimis changes without public participation, analogous to the proposed de minimis operating permit revisions.

The proposed § 51.161(e) would allow the public participation procedures under part 70 to meet the public participation requirement of NSR (i.e., this assumed a mandatory merging of the two programs).

B. Summary of Comments on Part 51 Revisions

Six of nine commenters who addressed the part 51 revisions supported the proposal as providing flexibility that would facilitate streamlining of the NSR program, analogous to the streamlining EPA is seeking to provide under part 70. Three commenters, however, opposed the revisions on the grounds that part 51 already provides broad authority for flexibility and does not need to be revised. Commenters supported the concept of a de minimis category; however, one commenter objected to EPA's approval authority of a State's list of changes that would

qualify as de minimis.

An environmental advocacy group opposed the revisions to part 51 on the grounds that they significantly narrowed mandatory minimum public participation requirements. The commenter pointed out that public participation procedures should be provided for significant projects regardless of whether or not they are at part 70 sources.

For the same reasons raised on the part 70 proposal, commenters objected to subjecting netouts to a 30-day comment period under the NSR program. These reasons include: netouts will be least understood by the public; State and local agencies have sufficient experience with netting; and the public should comment on the State's netting process, not on each netout transaction.

Two agency commenters pointed out that it is not appropriate to provide in the part 70 program for public comment procedures on minor NSR changes since some of these changes are not at part 70 sources. One agency stated that the proposed § 51.161(e) provision that part 70 public comment is sufficient for minor NSR changes is not appropriate since the two programs provide for public comment for different reasons.

C. Discussion of Part 51 Revisions

The EPA disagrees that part 51 prior to today's revisions clearly provided for broad flexibility and feels today's revisions are necessary for clarity. Furthermore, EPA believes today's revisions provide an adequate level of public participation for NSR actions, and that the provisions should be applicable to all sources regardless of whether or not they are part 70 sources. Furthermore, in light of the Agency's role for program oversight, it is appropriate for EPA to have authority to approve what categories of changes are designated as de minimis in both the State's NSR and part 70 programs.

The EPA agrees that not all netouts should be subject to a 30-day public comment period since there are numerous small netting transactions that take place and the operating permit

process could be overloaded with such changes that are of little interest to the public. As discussed below, only the more significant netouts will be retained in the significant permit revision category.

Today's revisions to part 51 follow the general approach proposed in August 1995 which allows public participation for most minor NSR changes to be less than that required for major NSR actions. This is a significant departure from the previous part 51 which, on its face, required a 30-day public comment period for all NSR actions. As for minor permit revisions under part 70, minor NSR changes at part 70 sources would be subject to a 21-day public comment period with many qualifying for de minimis status for which no public review would be required. For minor MSR changes at sources not subject to part 70, States would be allowed to vary public comment requirements according to the environmental significance of the change.

Section 51.161(b)(ii) is modified from the August 1995 proposal with respect to netouts. Under the August 1995 part 51 proposal, for minor NSR actions at part 70 sources, all netouts would have been subject to a 30-day public comment period. The regulations being promulgated today change that proposal in two respects. First, the 30-day public comment period under part 51 applies only to "major" netouts. Major netouts are defined as modifications where the prospective emissions increases from such changes, considered by themselves plus any emissions increases due to an increase in production rates at other units that will result directly from the change, would exceed the major source cutoff level for any pollutant subject to regulation under part C or D or section 112 of the Act. (A "minor" netout would be one where the increases are above the significance level, as defined in the PSD program, but below the major source cutoff level.) Second, "nonmajor" netouts are subject to a 21-day public comment period under today's revisions to part 51. This provision makes the requirements of part 51 consistent with those of the revised part 70.

The August 1995 proposed revisions to § 51.161(c) stated that changes could be designated in a de minimis category through a State's minor NSR regulations or part 70 program regulations. The proposal thus assumed that determinations of what changes are de minimis would be identical under both programs. The August 1995 proposed § 70.7(e)(3) stated that provisions providing for LES changes which are merged with a State review program could be made pursuant to regulations implementing either title V or title I; again the assumption was that identical public participation would be provided under both programs for any specific change. Neither of these provisions is being adopted, however, since the provisions are deemed to be unnecessary, i.e., there is nothing in part 70 to preclude how a State would structure its regulations. It is not EPA's discretion to influence how a State structures its regulations.

Minor NSR programs in a number of States do not now provide for public comment; some because they were approved prior to EPA's regulations regarding minor NSR. Therefore, to the extent existing minor NSR programs do not provide for such public participation, they will need to be revised to add those provisions.

As stated previously in section VIII.D.2. of this preamble, EPA would not consider a part 70 public comment period of less than 21 days as adequate for the nonmajor netouts and for adoption of synthetic minor limitations. This consideration also applies to the public comment provided under minor NSR. To the extent minor NSR programs do not now provide at least a 21-day public comment period for the nonmajor netouts and synthetic minor limitations at part 70 sources, EPA expects permitting authorities to modify their minor NSR programs to add such provisions.

XI. Program Transition

A. Submission of Initial Programs

From time to time, EPA allows out-of-date requirements to remain applicable until regulated entities have had a reasonable

opportunity to conform to the new requirements. Some refer to this concept as "grandfathering."

In the August 1994 notice, § 70.4(j) - Savings Provision was proposed to be added in anticipation that around the time part 70 was projected to be changed to include the new permit revision system, some initial State part 70 programs would not have been submitted. It was expected that the question would arise as to which version of part 70, the original or the changed, were these programs to conform. The proposed § 70.4(j) would allow a 6-month period after the publication date of the part 70 changes (this would be a one-time, date-specific provision geared only to this one part 70 revision action) during which a new program submission could be based on the original part 70. After that 6 months, any program submittals would have to be based on the revised part 70. This grandfathering was necessary since, due to the time it takes to adopt regulations, it might be impossible for a State to develop a program in 6 months or less which would meet all the revisions to part 70. Alternatively, States could choose to meet some or all of the revised part 70 provisions in their original program submittal, and there would be no reason for EPA to object to this approach.

Nine commenters addressed the proposed § 70.7(j). All supported the grandfathering concept. All commenters either wanted a longer period, 12 or 18 months, or made suggestions such as phasing in the part 70 changes or not making them applicable until permit renewal. In summary, all commenters felt the provision essential but felt the 6 months was too short. No commenter mentioned interim approvals.

At this point, all State and local programs have been submitted and approved by EPA. The provision in § 70.4(j) is being adopted, however, because all Tribal programs have not been submitted at this time. The 6 months is being retained because EPA wishes to minimize the time after part 70 is revised that new programs will adhere to the original part 70. Tribal programs are not bound by submittal time limits and the imposition of a

Federal program as were State programs. A Federal program is already in place for any tribal lands not covered by a Tribal program. If a Tribal program submittal 6 months after today's date cannot meet the revised part 70, submittal may be delayed until the necessary program changes can be made to meet the revised part 70. The only penalty will be a longer period before the Tribal program can replace the Federal program on those Tribal lands.

Section 70.4(j) was proposed to apply to new program submissions only. For added clarity, the word "initial" has been added to the first sentence of that section to avoid confusion that the 6 month provision may apply to program revisions submitted to meet today's revisions to part 70.

B. Submissions of Program Revisions to Conform to the Revised Part 70

In creating the original part 70, it was realized that no program is static and from time to time changes would be made to part 70 and States would need time to adapt to those changes. Accordingly, the original part 70 provides a time period for States to revise their part 70 programs in response to changes to part 70 and submit them to EPA for approval. This provision was in the original § 70.4(a). It allowed 12 months, or other time authorized by EPA, after the changes to part 70 for States to submit to EPA program revisions to conform to part 70 changes. These provisions were applicable to any change to part 70.

In the August 1994 notice, EPA proposed that the grandfathering provisions (§ 70.4(a) in the original part 70) relating to submission of program revisions to meet any changes to part 70 be moved to § 70.4(i)(1), which pertains to program revisions. The timeframes in these provisions were expanded from the original part 70. The proposal would require program revisions necessary to meet a changed part 70 to be submitted according to the following:

(i) Within 180 days if no new statutory authority or regulatory revisions are necessary;

(ii) Within 12 months if no new statutory authority is needed but regulatory revisions are necessary;

(iii) Within 2 years if new statutory authority is needed; or

(iv) . . . any other time period that the Administrator determines is appropriate to allow for program revision.

Nine commenters expressed support for a reasonable time period to revise programs. Concerns focussed on the proposed timeframes being too short to accomplish program revisions.

The preamble to the August 1995 notice (page 45551, third column, second paragraph) proposed to invoke the Administrator's authority under the proposed § 70.4(i)(1)(iv) to provide States 2 years to submit program revisions to meet the changed part 70, regardless of what changes were needed to the programs. The justification was that this specific set of part 70 revisions was very complicated and would require considerable effort on the part of the States.

The discussion went on to recognize some States' concerns over making two program revisions, one to address interim approval issues followed by another to meet the changed part 70. The notice proposed (page 45552) to allow States with an interim approval to combine the two program revisions into one and delay submittal up to the proposed deadline to submit the part 70 changes, i.e., 2 years after changes to part 70 are promulgated.

On October 31, 1996, in response to the August 1995 proposal to allow combining of program revisions and allow up to 2 years after part 70 is changed for their submittal, EPA took a rulemaking action (61 FR 56368). Rather than allow the August 1995 proposal concerning combining State program revisions to persist and give the impression that all interim approvals were going to be extended, a final action was taken to bring the uncertainties to closure. A June 13, 1996 policy memorandum ("Extension of Interim Approvals of Operating Permits Programs") set out the policy for combining program revisions, but it had to be followed by a rulemaking action to actually extend interim

approvals.

The October 1996 notice provided a 10-month extensions to programs already granted interim approval by the June 13, 1996 date of the memorandum, because EPA's August 1995 proposal could have caused some States to quit work on their interim approval deficiencies thinking they had up until 2 years after part 70 changes to submit them. (The 10 months was the time that had lapsed between the August 1995 notice and the June 1996 memorandum.) In the June 1996 memorandum and the October 1996 notice, the 2 years was shortened to 1 year or 18 months (in terms of program revision submittal, not interim approval expiration, interim approvals would expire 6 months after the submittal date) depending on whether regulatory changes or legislative authority, respectively, were needed to meet the revised part 70.

The combining of program revisions (one to correct interim approval deficiencies and the other to meet the revised part 70) now becomes an option that the permitting authority may or may not choose, and there is a shortening of time to meet the changed part 70 if the option is chosen by the State.

At any time States may choose to meet some or all of the changed part 70 provisions. This may be at the option of the State, and may be in conjunction with correcting interim approval deficiencies or at any other time. The only requirement applicable in terms of meeting the changed part 70 is that all necessary program revisions must be submitted by 2 years after today's date.

To clarify that States may choose to meet some of the provisions of the revised part 70 when then correct their interim approval program deficiencies, language to that effect has been added to § 70.4(e)(3). The language first notes that in judging the adequacy of program submittals to correct interim approval deficiencies, the version of part 70 that was in effect at the time of the interim approval will be the criteria. The language then goes on to provide the option, as noted above, to meet some

of the provisions of the revised part 70 in lieu of the original part 70. As a further clarification, language is also added to § 70.4(i) to stipulate that until a State revises its program, and EPA approves the program revision, to meet any revisions to part 70, the version of Federal and State regulations in effect prior to being revised will be in effect. This is only a statement of the implicit understanding that was already in part 70.

If a State does not choose the program revision combination described above, or the program already has full approval, the Administrator is exercising her option under § 70.4(i)(1)(iv) to allow up to 2 years for submittal of part 70 program revisions necessary to meet today's revisions to part 70. Section 70.4(i)(2) indicates that EPA will take rulemaking action to approve or disapprove any program revisions submitted to meet any revisions to part 70. No timeframe for this action is provided since these provisions are generally applicable to any program revision submittal and the time needed for EPA to act will vary according to the complexity of any submission.

The Agency will evaluate program revisions submitted to meet today's part 70 revisions and complete approval action as soon as possible. If any deficiencies are identified in a program revision submission, EPA will work with the State to correct them. If a State does not correct deficiencies such that EPA can approve the program as fully meeting part 70, EPA may disapprove the program revisions (§ 70.4(i)(2)(iii)). Upon disapproval, EPA may implement a Federal operating permits program in accordance with part 71.

The Agency, of course, prefers to take a necessary and reasonable period of time to work with States to correct program deficiencies rather than to act quickly to impose a Federal program. The Agency intends to maintain a cooperative working relationship with States and aid States in correcting deficiencies and is not bound by § 70.4(i) to impose a Federal program within any certain timeframe. However, the Agency, in

general, will not exceed the timeframes provided in § 70.10(b) for correcting program deficiencies and implementing a Federal program. Those timeframes include a limit of 18 months for program correction after EPA notifies the State of a deficiency and implementation of a Federal program 2 years after the notice if corrections to the program have not been submitted and approved by that time. The timeframes also include the provision that EPA may implement a Federal program immediately if the State has not taken significant action to correct the program within 90 days of a notice of program deficiency.

XII. Tribal Programs

Today's action finalizes several regulatory provisions that affect Indian Tribes, including minor clarifications to definitions as well as provisions affecting disapprovals of Tribal programs, operational flexibility requirements, and the definition of "affected State." These provisions are discussed in detail in this section.

On August 25, 1994 (59 FR 43956, "Indian Tribes: Air Quality Planning and Management," hereafter "proposed Tribal authority rule") EPA proposed regulations specifying those provisions of the Act for which it is appropriate to treat Indian Tribes as States. Therein (59 FR 43971-72) EPA described expectations for Tribal programs in implementing various aspects of the part 70 program and how they might differ from those expected for State part 70 programs. The August 31, 1995 part 70 revisions proposal announced EPA's intentions to amend part 70 to conform part 70 to the proposed Tribal authority rule. The EPA solicited comment on whether the August 1995 proposal accurately proposed to implement the changes to part 70 previously described in the proposed Tribal authority rule.

Several commenters noted an inconsistency between the proposed Tribal authority rule and the August 1995 part 70 proposal, in that the August 1995 proposal provided that Tribal part 70 programs would not be disapproved while the proposed Tribal authority rule indicated that inadequate Tribal submittals

would be disapproved. The EPA agrees with the commenters that EPA should disapprove Tribal programs that are inadequate. Consequently, the proposed addition to § 70.4(e) that no Tribal program will be disapproved is not being adopted. However, in general, EPA expects there to be few, if any, disapprovals because EPA expects to work closely with Tribes in developing part 70 program submittals. Given that Tribes face no deadlines for submittal, there is no reason to expect submittals that warrant disapproval. Also, EPA wishes to clarify that Tribes do not have a duty to resubmit part 70 programs following disapproval and will not face sanctions for failing to do so. Although sanctions will not apply to Tribes by November 15, 1997, to protect Tribal air quality EPA will promulgate, administer, and enforce a Federal operating permits program for Tribes that lack approved programs, as provided in § 71.4(b).

The proposed Tribal rule suggested that the three operational flexibility provisions in § 70.4(b)(12) and the emissions trading and alternative operating scenario provisions of §§ 70.6(a)(8-10) would be optional for Tribes. Initially, EPA believed that the technical expertise required to implement operational flexibility provisions would make it too difficult for Tribal programs to obtain EPA approval. Accordingly, the Agency proposed in the Tribal authority rule that for purposes of these provisions, Tribes would not be treated in the same manner as States. Subsequently, the August 1995 part 70 notice incorporated the approach of the proposed Tribal authority rule by proposing that § 70.4(b)(12) and §§ 70.6(a)(8-10) not apply to Tribal programs.

In response to the proposed Tribal authority rule, commenters objected to position in the proposed part 70 that Tribal part 70 programs would not be required to include the same operational flexibility provisions required of State part 70 programs. The Agency then reconsidered the issue. The EPA now believes that a better approach would be to treat Tribes in the same manner as States for purposes of these provisions, while

providing sufficient technical assistance, if needed, to enable Tribal permitters to issue permits that meet these operational flexibility requirements. Such an approach will assure that sources will be provided maximum flexibility regardless of whether the permitting agency is a Tribal or State agency. In addition, it will afford sources that are subject to Tribal part 70 programs the benefit of streamlined provisions that have been proposed for part 70. Consistent with the Tribal authority rule promulgated on xxx 1997 (62 FR xxx), today's action subjects Tribal permitting programs to all of the operational flexibility provisions to which State programs are subject. The phrase "Except for Tribal programs," is, therefore, not being added to the beginning of the first sentences in § 70.4(b)(12) and §§ 70.6(a)(8-10) as proposed.

The EPA also proposed that § 70.8(b) be revised to require that permitting authorities give notice of each draft permit or draft permit revision to any eligible Indian Tribe that administers a Tribal program and that otherwise meets the definition of "affected State" set forth in § 70.2. Under the provision adopted today, an Indian Tribe would need to (1) meet the eligibility requirements of section 301(d)(2) of the Act, implemented by 40 CFR part 49; (2) administer a review program, and (3) satisfy the locational requirements of the "affected State" definition, to receive notice under § 70.8(b).

The EPA expects that most recognized Tribes will readily be able to meet the eligibility requirements established in 40 CFR part 49 for being treated in the same manner as a State for the limited purpose of receiving notice pursuant to § 70.8(b). To be treated in the same manner as a State for purposes of receiving notice, a Tribe must meet the requirements of § 49.6. Sections 49.6(a-c) require that the Tribe be federally recognized, that the Tribe has a governing body carrying out substantial governmental duties and functions, and that the functions to be exercised by the Tribe pertain to the management and protection of air resources within the exterior boundaries of the

reservation or other areas within the Tribe's jurisdiction. Section 49.6(d) requires that the Tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purpose of the Act and all applicable regulations.

Tribes that want to receive notice under § 70.8(b) are not required to submit a part 70 program to meet the capacity requirement of § 49.6(d). The EPA recognizes that some Tribes may develop a very limited permit program, at least initially, that focuses on review of permitting actions of neighboring jurisdictions. To demonstrate the capacity to receive notice under § 70.8, a Tribe need only designate a person to receive the notice and inform the Regional Administrator of the designation. A letter from the governing body of the Indian Tribe requesting notice under § 70.8(b) and designating the person to receive the notice would satisfy the requirements of capacity and the administration of a review program for purposes of § 70.8(b)(1).

Accordingly, EPA has adopted a provision that clarifies the meaning of "administers a Tribal program" and clarifies that the Tribe would need to meet the requirements of paragraphs (1) and (2) of the definition of "affected State," which refer to the proximity of the source subject to the permitting action.

The EPA has also made minor revisions to several definitions that affect Indian Tribes. The definition of "Eligible Indian Tribe" was changed to clarify that to be treated in the same manner as a State, Tribes must not only comply with the requirements of section 301(d)(2) of the Act but also with the regulations that implement that section. Also, as a convenience to the reader, EPA has included the statutory definition of "Indian Tribe" in lieu of referring to the statutory citation (section 302(r) of the Act). In addition, EPA revised the definition of "State" to refer to Indian Tribes. The EPA adopted this approach in lieu of adding numerous references to "Indian Tribes" and "Indian governing bodies" throughout the final rule.

In those few instances when meaning of the term "State" does not include those terms, part 70 so specifies. For example, the language of § 70.4(a) which states the required submittal dates for State part 70 programs also excludes Indian Tribes from the definition of "State" for purposes of the submittal deadline. Similarly, Indian Tribes are not within the meaning of "State" for purposes of § 70.4(l), which discusses sanctions for failing to adopt or adequately administer or enforce an approvable part 70 program.

XIII. Administrative Requirements

A. Docket

The docket for this regulatory action is A-93-50. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this rulemaking. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials). The docket is available for public inspection at EPA's Air Docket, which is listed under the ADDRESSES section of this notice.

B. Executive Order (E.O.) 12866

Under E.O. 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether each regulatory action is "significant," and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

1. Have an annual effect on the economy of $100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

3. Materially alter the budgetary impact of entitlements,

grants, user fees, or loan program or the rights and obligation of recipients thereof.

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Pursuant to the terms of Executive Order 12866, OMB and EPA consider this action related to part 70 permit revisions a "significant regulatory action" within the meaning of the Executive Order. The EPA has submitted this rulemaking package to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in Docket A-93-50. Any written comments from OMB to EPA, and any EPA responses to those comments, are also included in Docket A-93-50.

C. Regulatory Flexibility Act Compliance

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that the part 70 revisions being promulgated today will not have a significant economic impact on a substantial number of small entities. In developing the original part 70 rule, the Agency determined that it would not have a significant economic impact on a substantial number of small entities. Similarly, the same conclusion was reached in an initial regulatory flexibility analysis performed in support of the August 1994 proposed part 70 revisions and in the analyses made in connection with updating the ICR for the part 70 regulations.

The primary impact of these regulatory revisions is on the process for revising permits. The total impact of today's action is an estimated savings of around $22 million per year. This breaks out to be an estimated $44 million reduction in burden on permitting authorities, due to more flexible and less resource intensive actions to revise permits, and an estimated $22 million increased burden on sources. There will be more permit revisions during the term of a permit due to the elimination of off-permit; however, the burden to process those revisions are substantially reduced resulting in the estimated $44 million savings per year.

The burden on sources will increase by the estimated $22 million per year due to the necessity to apply for these (mostly minor NSR) changes that would have been off-permit under the original part 70.

Since there are around 22,000 sources in the program at this time, the burden will be an average of $1,000 per source per year. Most of these minor NSR changes, however, will occur at large facilities owned by large corporations. The annual burden on small businesses will be only a few hundred dollars per source, and then only if they make minor NSR changes that would have been off-permit under the original part 70. This action, therefore, does not substantially alter the part 70 regulations as they pertain to small entities and, accordingly, will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in part 70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq. and has assigned OMB control number 2060-0243. The original ICR for part 70 was approved in July 1992. A revised ICR was prepared in 1996 and was made available in draft form for public comment on June 13, 1996 (61 FR 30061). After closure of the public comment period, the ICR was submitted to OMB; an announcement of this submittal was made on August 27, 1996 (61 FR 44049). The OMB approved the revised ICR on February 20, 1997.

The only significant impact of today's action on paperwork burden is due to the modification of the permit revision system in part 70. The new ICR indicates the average annual burden attributable to permit revisions will increase by approximately 1.2 million hours over the burden estimates in the previous ICR. This is misleading, however, because the number of permit revisions included in the previous ICR was an average of around 2,000 per year and the new ICR estimates an annual average of approximately 47,000 permit revisions. This difference is

because the new ICR covers the period from October 1996 to October 1999 when programs will have moved into the permit revision phase. The previous ICR covered a 3-year period of time where programs were just beginning to issue permits and very few (i.e., the 2,000 per year) permit revisions were anticipated during that time.

To determine the true costs of today's action, it is more appropriate to look at the burden attributable to permit revisions assuming all initial permits have been issued. The revised permit revision system reduces the cost to permitting authorities by 91 per cent per permit revision and to sources by 70 per cent per permit revision. However, the total number of permit revisions increases from approximately 20,000 to 88,000 due to elimination of the "off-permit" option previously available. Taking into account the change in number and costs of permit revisions, the actual burden difference between the original part 70 and the revised part 70 is a decrease of 1.0 million burden hours for permitting authorities and an increase of .5 million hours for sources. Therefore, it is estimated that overall there will be a savings of approximately .5 million burden hours. (Translated into dollars, these figures equate to the amounts discussed in section XIII.C.)

The ICR prepared for the part 70 rule, and approved in February 1997, is not affected by today's action because the part 70 revisions were already included in the estimated burden of the revised ICR. This was possible since the substance of the revisions affecting burden (i.e., merging of programs) could already be adopted by permitting authorities.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to:

Director, Regulatory Information Division
Office of Policy, Planning, and Evaluation (2136)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

and:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer for EPA
725 17th Street, NW
Washington, DC 20503

Include the ICR number in any correspondence.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year.

The EPA has determined that today's revisions to part 70 do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector, in any 1 year. Today's action does not amend the part 70 regulations in a way that significantly alters the expenditures resulting from the Act requirements. Therefore, the Agency concludes that it is not required by section 202 of the UMRA of 1995 to provide a written statement to accompany this regulatory action.

F. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement

Fairness Act of 1996, EPA submitted a report containing these part 70 revisions and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of today's Federal Register. Today's part 70 revisions are not a "major rule" as defined by section 804(2) of the APA as amended.

List of Subjects in 40 CFR Part 70

Environmental protection, air pollution control, prevention of significant deterioration, new source review, fugitive emissions, particulate matter, volatile organic compounds, nitrogen dioxide, carbon monoxide, hydrocarbons, lead, operating permits.

Dated: _____ Signed: _____
Carol M. Browner,
Administrator

Billing Code: 6560-50-P